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Digest of the decisions of international tribunals relating to State Responsibility, by the Secretariat

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1964 , vol. II

50. In the course of the discussion in the Second Committee, attention was drawn on several occasions to the connexion between the subject under discussion and the work on the codification of the topic of State responsibility in the Sixth Committee. In part II of the abovementioned resolution, the General Assembly:

" . . .

" *Welcomes* the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly."

51. In addition, the Secretariat prepared a study on " The Status of the Question of Permanent Sovereignty over Natural Wealth and Resources " (A/AC.97/5/Rev.2),[45] chapter III of which contains a summary of international adjudication and studies of draft codification relating to the responsibility of States in regard to the property and contracts of aliens.

52. This study was followed by another report by the Secretary-General (E/3840) prepared in accordance with the terms of part III of General Assembly resolution 1803 (XVII), in which the Secretary-General was requested " to continue the study of the various aspects of permanent sovereignty over natural resources ... and to report to the Economic and Social Council... ".

53. This report includes a part III (B) (paras. 221-239) dealing with State responsibility for property rights of aliens in cases of State succession. In this part of the report, consideration is given to State responsibility for State contracts, and specifically to the questions of subrogation of the successor State in respect of rights and duties under the concession contract, respect for private acquired rights, observance in good faith of agreements, requirement for compensation in the event of a taking, and standards of compensation.

54. Moreover, in part III (C) (paras. 240-244) of the report, reference is made to the studies of the International Law Commission, and in particular to the reports of the Sub-Committee on State Responsibility and of the Sub-Committee on the Succession of States and Governments.

[45] United Nations publication, Sales No. 62.V.6, part I.

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Digest of the decisions of international tribunals relating to State responsibility, prepared by the Secretariat

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Introduction

1. At its 686th meeting, on 24 May 1963, the International Law Commission requested the Secretariat to prepare a digest of the decisions of international tribunals in the matter of State responsibility.[1] The following digest has been compiled to cover the pertinent decisions of the International Court of Justice, the Permanent Court of International Justice, the Permanent Court of Arbitration and of other international tribunals whose awards are contained in the *Reports of International Arbitral Awards,* vols. I-XI. Reference has been made only to the more general aspects of the decisions in question.

2. The decisions have been arranged alphabetically under subject headings which follow as far as possible within the limits of the available material the programme of work approved by the International Law Commission at its 686th meeting. Cross-references have been made to decisions under other subject headings where appropriate. The heading of each case lists the title; date; parties; arbitrator or tribunal; and source reference. An index of cases is at the back of the digest.

I. Origin of international responsibility: international wrongful act

Administrative Decision No. II (1923)

Germany, United States

Germany-United States Mixed Claims Commission: Umpire: Parker (United States of America); Kiesselbach (Germany); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. VII. p. 23

3. It was contended by the United States that under the relevant section of a Resolution of Congress and Article 231 of the Treaty of Versailles, both of which had been incorporated in the Treaty of Berlin between Germany and the United States, Germany was responsible for all damage caused to United States nationals as a result of the 1914-1918 War, irrespective of the direct cause of the particular injury. The Commission held that although it was immaterial whether the United States national was injured directly or indirectly, as a stockholder or otherwise, " a clear unbroken connexion " (p. 29) was required between Germany's act and the loss complained of. " It matters not how many links there may be in the chain of causation connecting Germany's act and the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act .... All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed " (pp. 29-30). Accordingly, the Commission rejected the United States contention under which Germany would have been responsible for all consequences of the war. The Commission distinguished between Article 231 of the Versailles Treaties, which amounted to an acceptance by Germany of moral responsibility, and Article 232 and the Annex pertaining thereto, where Germany's financial responsibility for losses occurring during belligerency was limited and clearly defined (p. 31).

For a similar decision by the same Tribunal see the *War Risks Insurance Premium Claims,* R.I.A.A., Vol. VII, p. 44 at pp. 55-63.

[1] Summary record of the 686th meeting in *Yearbook of the International Law Commission, 1963,* vol. I; see also *Yearbook 1963,* vol. II, p. 224, para. 55.

Case concerning the Factory at Chorzow (Claim for Indemnity) (Jurisdiction) (1927)

Germany v. Poland

Permanent Court of International Justice, Series A, No. 9

4. Under the Geneva Convention of 1922, concluded between Germany and Poland, no dispossession of German interests could be effected before notice had been given to the owner, thus affording him an opportunity of being heard by the competent arbitral tribunal. The Permanent Court held that the Polish Government could not therefore require the German claimants to seek redress before the arbitral tribunals following dispossession because the only remedy then available was reparation, whilst if the correct procedure had been followed the wrong itself might not have occurred. The Court declared that it was :

> " ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him " (p. 31).

The Corfu Channel Case (Merits) (1949)

United Kingdom v. Albania

International Court of Justice Reports, 1949, p. 4

5. In October 1946, two British naval vessels were mined whilst sailing through the Corfu Channel ; in November three weeks later a minesweeping operation was carried out by British ships, within Albanian territorial waters, despite the lack of consent of the Albanian Government. After diplomatic negotiations, the Parties submitted two questions to the International Court under a Special Agreement : firstly, was Albania responsible under international law for the damage and loss of life caused by the sinking of one of the British vessels and the damage done to the other, and in consequence under a duty to pay compensation ; and, secondly, had the United Kingdom violated Albanian sovereignty by reason of the entry into Albanian territorial waters of British ships in October and November 1946, and was there any duty to give satisfaction ?

6. The United Kingdom alleged that the two ships had been struck by mines which formed part of a minefield laid in the Channel with the knowledge or connivance of Albania. The Channel had been swept and declared free of mines in 1944 and 1945. In considering this allegation (pp. 18 *et seq.*) the Court declared that knowledge of the minelaying could not be imputed to Albania by reason merely of the fact that a minefield discovered in Albanian territorial waters had caused the explosions. Such an occurrence did, however, require an explanation from the territorial State concerned and that State's responsibilities in this regard could not be evaded by stating that it was ignorant of the circumstances of the act. At the same time it could not be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of the unlawful act. " This fact by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof " (p. 18).

7. The Court nevertheless held that the exclusive territorial control exercised by a State has a bearing upon the methods of proof available to establish the knowledge of that state. The other State, which had been a victim of a breach of international law, should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. The Court determined that, by virtue of inferences which left no room for reasonable doubt, Albania had knowledge of the minelaying in her waters independently of any connivance on her part in the operation. The Court further determined that in the circumstances Albania had been under an obligation to notify shipping of the existence of the minefield — an obligation based on " elementary considerations of humanity ... ; the principle of the freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States " (p. 22). Nevertheless, though the Albanian authorities had had an opportunity to do so, they had not attempted to prevent the disaster. " These grave omissions involve the international responsibility of Albania " (p. 23).

8. Regarding the second question the Court held that the passage of British ships through the Channel in October 1946 was in exercise of the right to pass through an international highway and that no breach of international law was involved (pp. 28-30). The minesweeping operation carried out on two days in November 1946, however, against the express wishes of the Albanian Government, was found to be a violation of Albanian sovereignty. The Court rejected the argument of the British Government that this operation was necessary in order to secure the *corpus delicti*. The Court stated that the exercise of a right of intervention of this nature was unacceptable on the ground that it constituted a manifestation of a policy of force which had no place in international law (pp. 34-35).

On the measure of damages awarded by the Court, see para. 167 and paras. 173-174 *infra*.

Dickson Car Wheel Case (1931)

Mexico, United States

Mexico-United States General Claims Commission : President : Alfaro (Panama) ; Macgregor (Mexico) ; Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 669

9. The United States of America presented a claim in respect of certain car wheels sold to the National Railways of Mexico shortly before the Mexican Government took over the Railways Company. The Government operated the railways for ten years without paying any revenue to the Railways Company ; the property was then restored to private management. The Commission held that the Government was not responsible, by virtue of its action in taking over the railways, for the destruc-

tion of the rights held by the Dickson Car Wheel Company. The Railways Company had never lost its own juridical identity and it would have been possible for the Dickson Car Wheel Company to have sued the Railways Company before the Mexican court during the period of possession by the Government (pp. 674-675). The Commission also rejected a contention that the Government had obtained an unjust enrichment at the expense of the Dickson Car Wheel Company. Before a State could be held to have incurred responsibility, " it is necessary that an unlawful international act be imputed to it, that is, that there exists a violation of a duty imposed by an international juridical standard " (p. 678). Under the Convention establishing the Commission the further requirement was added that a national of the claimant Government should have suffered damage. The fact that an individual suffered injury was insufficient to create responsibility on the part of the Government towards the individual, but only towards his Government. After examining the arguments put forward in previous cases, the Commission reached the following conclusions :

" I. A State does not incur international responsibility from the fact that a subject of the claimant State suffers damages as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of friendship.

" II. A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature " (p. 681).

10. The damage suffered by the Dickson Car Wheel Company was of a provisional character. Moreover, even if the Company had been unable to collect the amount due to it from the Railways Company, that Company had been placed in a special position by reason of the fact that the Government had had to take over the railways in order to face an emergency which endangered the nation. No responsibility arose from the act. " States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for Claims " (p. 681).

11. See also the *International Fisheries Company* case, R.I.A.A., Vol. IV, p. 691, where the Tribunal declared :

" It is necessary that the loss which the national entity of the respondent country has suffered be one of the kind which gives rise or ground to an international claim in the supposition that that entity were an alien and therefore had the right to make a claim. States according to a thoroughly established rule of international law, are responsible only for those injuries which are inflicted through an act which violates some principle of international law " (p. 701).

Case of the Free Zones of Upper Savoy and the District of Gex. (Second Phase) (1930)
France v. Switzerland
Permanent Court of International Justice, Series A, No. 24

12. This case concerned the effect of Article 435, paragraph 2, of the Treaty of Versailles upon earlier treaties which defined the customs and economic régime of the Free Zones of Upper Savoy and the District of Gex. The Court held that a reservation should be made in respect of a possible abuse of the right of the French Government to apply French fiscal legislation in the territory of the Zones, as in any other part of French territory, but that such an abuse could not be presumed by the Court (p. 12).

See also *Case of the Free Zones of Upper Savoy and the District of Gex, (1932) P.C.I.J., Series A/B, No. 46,* esp. at p. 167.

S.S. I'm Alone *(1933 and 1935)*
Canada, United States
Arbitrators : Duff (Canada) ; Van Devanter (United States of America)
Reports of International Arbitral Awards, Vol. III, p. 1609

13. The *I'm Alone,* a British ship of Canadian registry, was sunk by a United States coast guard vessel some 200 miles off the coast of the United States. The ship had refused to stop when hailed outside the three mile limit but within the limits set by a Convention, entered into between Great Britain and the United States, permitting search and other measures to be taken by the United States authorities. Canada protested that the sinking was an illegal act which was not justified under the terms of the Convention. The Arbitrators held that, although necessary and reasonable force might be used in searching ships suspected of smuggling, the admittedly intentional sinking of the *I'm Alone* was unjustified under the Convention or under any principle of international law (p. 1617). On the measure of damages awarded, see para. 176 *infra.*

The Mavrommatis Palestine Concession (1924)
Greece v. United Kingdom
Permanent Court of International Justice, Series A, No. 2

14. The Greek Government claimed that the British authorities in Palestine had refused to recognize the rights granted to Mr. Mavrommatis, a Greek national, under certain concessionary contracts which he had concluded with the Ottoman authorities prior to the establishment of the British mandate over Palestine. In giving judgement the Permanent Court of International Justice emphasized that, when a dispute between a State and an alien is taken up by the latter's Government, the dispute enters upon a new phase and becomes a dispute in international law. The fact that the injury was inflicted upon a private interest was irrelevant ; in taking up the case of one of its subjects a State was asserting its own right to ensure, in the person of its subjects, respect for the rules of law (p. 12).

The Permanent Court made similar statements in the *Case concerning the payment of various Serbian Loans issued in France* and the *Case concerning the payment in gold of the Brazilian Federal Loans issued in France*, P.C.I.J., Series A, Nos. 20/21, at pp. 17-20, and in the *Panevezys-Saldutiskis Railway* case, P.C.I.J., Series A/B, No. 76 at p. 16.

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, pp. 88-91 and 98-100

Claim No. 1

15. Greece refused to pay lighthouse dues for requisitioned ships on the ground that these were " warships properly so-called " and therefore exempt under the terms of the lighthouse concession held by the French claimants. This position was maintained both when Greece was the occupying Power and after she had acquired sovereignty over the parts of former Turkish territory concerned. The Tribunal held that the claim of the French firm should succeed except in respect of requisitioned ships which Greece could prove had been converted so as to enable them to take part effectively in military operations. The Tribunal declared that the claim was to be judged in the same light despite the fact that the juridical foundation of Greece's responsibility was different for the two periods — " *excès de ses pouvoirs internationaux de puissance occupante, dans un cas, non-observation des clauses du contrat de concession en qualité d'Etat concédant par subrogation dans l'autre* " (p. 98).

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, pp. 100-101

Claim No. 5

16. The French firm presented a claim for compensation on the ground that they had lost revenue owing to the failure of the Greek Government to lend its authority to the collection of lighthouse dues payable under the terms of their concession. The Tribunal upheld the contention of the French Government that the Greek Government had negligently or deliberately failed to assist in ensuring the collection of dues, despite the clear terms of the concession obliging it to render such assistance. It was held that the plain duty of the grantor State was not neutralized by a clause stating that the dues were to be collected by the concessionnaire in the Government's name without the concessionnaire being able to claim any compensation in respect thereof from the Government. The Tribunal found that this clause was intended to protect the State against the wrongs of others, for example the non-payment of dues owing to the insolvency of a shipping company, but did not operate to prevent it from remaining responsible for its own wrongs. On the measure of damages awarded by the Tribunal in this claim, see para. 187 *infra*.

Treaty of Neuilly, Article 179, Paragraph 4 (Interpretation) (1924)

Bulgaria v. Greece

Permanent Court of International Justice, Series A, No. 3

17. Article 179, paragraph 4, of the Treaty of Neuilly provided that all property, rights and interests of Bulgarian nationals within the territory of the Allied or Associated Powers might be liquidated and charged, *inter alia*, with the payment of claims brought by the nationals of those Powers in respect of acts committed by the Bulgarian Government or authorities after 11 October 1915. The Court held that the expression " acts committed " (*actes commis*) contemplated " acts contrary to the law of nations and involving an obligation to make reparation " (p. 8).

For similar *dicta* see the *Goldenberg* case (1928), R.I.A.A., Vol. II, p. 901, at pp. 906-908 and *Responsibility of Germany for Damage caused in Portuguese Colonies in South Africa (Merits) (1928)*, R.I.A.A., Vol. II, p. 1011, at p. 1016.

Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) (1950)

International Court of Justice Reports, 1950, p. 221

18. In an earlier Advisory Opinion (*I.C.J. Reports 1950*, p. 65) the International Court held that the Governments of Bulgaria, Hungary and Romania were under an obligation to appoint their representatives to the Commissions established under the Peace Treaties concluded after the war of 1939-1945. Following the refusal of those States to appoint representatives, the Court stated that " . . . it is clear that refusal to fulfil a treaty obligation involves international responsibility " (p. 228). The Court held, however, that this refusal did not alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of the United Nations of a power of appointment. " The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaty is one thing; international responsibility is another " (p. 229).

Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the War

Portugal, Germany

Arbitrators: de Meuron, Fazy, Guex (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 1035

19. In the course of its decision regarding a number of claims in respect of various requisitions and acts of

pillage of Portuguese property in Belgium during the period of German military occupation, the Tribunal stated that the plaintiff State was bound to prove : (i) the existence of an act, contrary to international law, which had caused the damage ; (ii) that the act had been caused by the German State or by German authorities ; (iii) the fact that the act was committed between 31 July 1914, and 9 March 1916, when Portugal entered the war ; and (iv), the amount of the damage. The Tribunal declared that the German invasion of Belgium did not in itself give rise to responsibility in respect of the Portuguese claims since, although it had furnished the occasion, it had not been the cause of the concrete acts of requisition and pillage (p. 1040). On the question of damages, see para. 194 *infra.*

Responsibility of Germany for damage caused in the Portuguese Colonies in South Africa (Merits) (1928)

Portugal, Germany

Arbitrators : de Meuron, Fazy, Guex (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 1011

20. Portugal claimed that Germany was responsible for the damage caused in its African colonies by an invasion of German troops prior to the entry of Portugal into the 1914-1918 War. The Tribunal found that the principal incident at Naulilaa followed a frontier incident in which several Germans had been killed as a result of a misunderstanding (pp. 1023-1025) and that no violation of international law had occurred on the part of Portugal justifying the German reprisal (pp. 1025-1028). The reprisal was therefore itself in breach of international law and Germany was liable to pay for the damage directly caused by German troops (p. 1029).

21. Portugal claimed that Germany should also be held responsible for the indirect damage caused by the invasion, in particular for the consequences of the withdrawal of Portuguese troops. The Tribunal held that, although Germany could not be held solely responsible for the consequences of the withdrawal, nevertheless Germany was responsible for such indirect losses as could reasonably have been foreseen (pp. 1029-1032). On the question of damages, see para. 195 *infra.*

The Savarkar Case (1911)

France, United Kingdom

Permanent Court of Arbitration : Beernaert (Belgium) ; Renault (France) ; Gram (Norway) ; Savornin Lohman (Netherlands) ; Desert (United Kingdom)

Reports of International Arbitral Awards, Vol. XI, p. 243

22. Savarkar, a British subject, escaped at Marseilles from a British merchant ship which was transporting him from England to India where he was to be tried on a charge of abetting a murder. Whilst being pursued by Indian policemen from the ship he was captured by a French police official who returned him to the ship, which sailed the next day. Subsequently France sought the return of the fugitive on the ground that his delivery to the British prison officers was contrary to international law. The Permanent Court of Arbitration held that, although there had been an " irregularity " in the arrest of Savarkar and in his being handed over to the British officers, there was no rule of international law requiring Great Britain to return him. The Court also stated that the case was manifestly not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in a foreign country and that, in the circumstances, no violation of French sovereignty had occurred (pp. 253-254). *Cf.* the *Colunje* case, R.I.A.A., Vol. VI, p. 342 ; para. 86 *infra.*

Spanish Zone of Morocco Claims (1925)

Spain, United Kingdom

Rapporteur : Huber (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 615

23. Great Britain put forward a series of claims on behalf of British subjects and protected persons who had suffered losses or injuries in the Spanish Zone of Morocco between 1913 and 1921. Before dealing with the individual claims the Rapporteur, whose functions approximated to those of an Arbitrator, laid down certain general principles in regard to State responsibility (pp. 639-650). With reference to the conflicting interests of the territorial State and the State seeking to protect its nationals, he declared that, for international responsibility to arise.

> " *. . . il est nécessaire qu'il y ait soit violation d'une clause prescrivant un traitement particulier de l'étranger, soit violation manifeste et grave des règles applicables aux nationaux au même titre qu'aux étrangers* " (p. 641).

Foreign intervention could only be exercised by way of an exception to the fundamental principle of respect for territorial sovereignty. Nevertheless, up to a certain point the interest of the State in being able to protect its nationals must carry more weight than the considerations of territorial sovereignty.

> " *Ce droit d'intervention a été revendiqué par tous les Etats : ses limites seules peuvent être discutées. En le niant, on arriverait à des conséquences inadmissibles : on désarmerait le droit international vis-à-vis d'injustices équivalant à la négation de la personnalité humaine ; car c'est à cela que revient tout déni de justice* " (*ibid.*).

Whilst the fact that an alien was a victim of an ordinary offence was insufficient in itself to make the matter an international one, even if the subsequent proceedings proved unsuccessful, the limitation imposed on the right of States to intervene,

> " *. . . présuppose que la sécurité générale dans les pays de résidence de ceux-ci ne tombe pas au-dessous d'un certain niveau, et qu'au moins leur protection par la justice ne devienne pas purement illusoire* "

(p. 642). See also pp. 645-646.

The Trail Smelter Case (1938 and 1941)
Canada, United States
Arbitrators : Hostie (Belgium) ; Greenshields (Canada) ; Warren (United States of America)
Reports of International Arbitral Awards, Vol. III, p. 1905

24. A smelter plant situated in Canada was alleged to have caused damage in the State of Washington in the United States by reason of the sulphur dioxide fumes emitted from the plant and carried by wind and air currents over the frontier. After examining United States cases, in the absence of international decisions dealing with similar situations, the Tribunal concluded that " under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence " (p. 1965). Considering the circumstances of the case the Tribunal therefore found Canada responsible in international law for the conduct of the Smelter, irrespective of the undertakings on the part of Canada contained in the Convention (pp. 1965-1966). In accordance with the terms of the Convention, the Tribunal laid down a series of measures to be adopted by the Trail Smelter in order to prevent further damage (pp. 1934-1937 ; 1966-1980). On the question of the measure of damages, see para. 199 *infra*.

The S.S. Wimbledon *(1923)*
Allied Powers v. Germany
Permanent Court of International Justice, Series A, No. 1

25. The *S.S. Wimbledon*, an English steamship chartered by a French company, was refused passage through the Kiel Canal by the German authorities on the ground that the ship's transit for the purpose of carrying munitions to the Polish Naval Base in Danzig would constitute a violation of German neutrality in view of the war then being waged between Poland and Russia. The Permanent Court of International Justice found that, by virtue of Article 380 of the Treaty of Versailles, the Canal had become an international waterway and that Germany was not entitled to prohibit the passage of ships of nations at peace with Germany, nor was her neutrality infringed by the passage of ships carrying contraband. The Court held that, having wrongfully refused passage, Germany was responsible for the loss occasioned by the ship's delay and was obliged to compensate the French Government on behalf of the charterers (p. 30). Regarding the measure of damages awarded by the Permanent Court, see para. 165 *infra*.

II. State responsibility in respect of acts of legislative, administrative and other State organs

(A) Legislative organs

Case concerning Certain German Interests in Polish Upper Silesia. (The Merits) (1926)
Germany v. Poland
Permanent Court of International Justice, Series A, No. 7

26. The German Government claimed that certain legislative measures taken by the Polish Government affecting German interests in Upper Silesia were in breach of Poland's international obligations. The Court declared that municipal laws are " facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures " (p. 19) and found that the Polish legislation in question was contrary to the German-Polish Convention protecting the German interests concerned.

German Settlers in Poland (1923)
Permanent Court of International Justice, Series B, No. 6

27. The Court was asked to give an advisory opinion on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, in particular the compatibility with the international obligations accepted by Poland of Polish legislative measures affecting contracts entered into by the settlers with the Prussian Government. The Court determined that, under the Minorities Treaty, Poland had agreed that all Polish nationals, including those of German origin, should receive the same civil and legal rights. The Court found that the legislative measures taken by the Polish Government amounted to a virtual annulment of the private rights which the settlers had acquired under their contracts with the Prussian Government and which subsisted even after the change of sovereignty. The Court therefore held that the measures adopted by the Polish Government were not in conformity with Poland's international obligations (pp. 19-20 ; 35-38, esp. at p. 36).

(B) Executive and administrative organs

Aboilard Case (1925)
Haiti, France
Arbitral Commission : Vignaud (Umpire) ; Renault (France) ; Ménos (Haiti)
Reports of International Arbitral Awards, Vol. XI, p. 71

28. The Government of Haiti challenged the validity of certain concessionary contracts which Aboilard, a French national, had concluded with the authorities of Haiti, on the ground that the contracts were null and void since they had not received legislative approval. The Arbitral Commission established to consider the case held that the responsibility of Haiti was engaged as a result of the conclusion of the contracts by the executive ; Aboilard had had every reason to believe that the contracts were properly concluded. The damages and rate of interest awarded by the Commission

for the withdrawal of the concessions were, however, less than would have been the case had the contracts received legislative approval (pp. 79-81).

Aguilar-Amory and Royal Bank of Canada Claims (1923)
Costa Rica, United Kingdom
Arbitrator: Taft (United States of America)
Reports of International Arbitral Awards, Vol. I, p. 369

29. President Tinoco held power in Costa Rica between 1917 and 1919. The succeeding Government passed a Law nullifying the contracts entered into by President Tinoco and certain of the decrees which he had enacted. The British Government submitted two claims, one in respect of the alleged indebtedness of the Bank and Government of Costa Rica to the Royal Bank of Canada, by reason of sums paid to President Tinoco, and the other regarding an oil-exploring concession which President Tinoco had granted to a company owned by a British company. The Costa Rican Government argued, *inter alia,* that the Tinoco régime had never been recognized as the *de facto* or *de jure* Government by Great Britain and that the acts of Tinoco were void as being in violation of the Constitution.

30. The Arbitrator found that the Tinoco régime had been a *de facto* Government and that Tinoco's acts were binding on the State (pp. 377-381). The fact that Great Britain had not recognized Tinoco's Government, although of evidential weight, did not preclude a claim being brought (pp. 382-384). The Arbitrator determined that the Royal Bank of Canada could not recover sums paid to Tinoco and his brother at a time when the Bank must have known that those sums were to be used for their personal expenditure, after taking refuge abroad, and not for legitimate government expenditure. The Arbitrator held that, since the nullifying law did not constitute an international wrong, on grounds of equity the Bank should be subrogated to the title of Costa Rica in a mortgage of Tinoco's estate, granted by Tinoco's widow (pp. 394-395). As regards the Aguilar-Amory oil contract, the Arbitrator held that this was invalid under Costa Rican law at the time it was granted in 1917 and that the claim could not therefore be sustained (pp. 395-399).

31. See also the *French Claims Against Peru,* R.I.A.A., Vol. I, p. 215, where an attempt by the Peruvian Congress to nullify the acts of the President was set aside on the ground that it could not be applied to foreigners who had acted in good faith.

Robert E. Brown Case (1923)
United Kingdom, United States
United Kingdom-United States Arbitral Tribunal: President: Fromageot (France); Mitchell-Innes (United Kingdom); Olds (United States of America)
Reports of International Arbitral Awards, Vol. VI, p. 120

32. In 1895 Brown, an American citizen, pegged out a number of claims in an area which had been proclaimed a public gold field by the President of the South African Republic. The proclamation was withdrawn and new regulations were issued governing the issue of mining claims in the area of question. The High Court of the South African Republic gave judgement in Brown's favour and held that he was entitled to damages in the event that he was unable to peg off his original claims. The licences subsequently issued by the South African authorities in respect of Brown's claims were of no practical value, however. Brown sought to obtain damages but his case was dismissed after the executive had brought pressure to bear on the judiciary and had dismissed the Chief Justice. Brown did not start a new action, although it was open to him to do so.

33. The Tribunal held that Brown had acquired rights of a substantial character under the laws in force in 1895 and that the various steps taken by the South African authorities in order to defeat Brown's claim amounted to a clear denial of justice. Brown's claim was not defeated by a failure to exhaust local remedies, the futility of further proceedings having been fully demonstrated (pp. 128-129). The Tribunal found that Brown's claim could nevertheless not succeed as against the British Government since that Government was not liable as a succeeding State, nor as a former suzerain over the South African Republic (pp. 129-130).

The Oscar Chinn Case (1934)
United Kingdom v. Belgium
Permanent Court of International Justice, Series A/B, No. 63

34. Mr. Chinn owned a transport and shipbuilding business operating in the Belgian Congo. As a result of measures taken by the Belgian Government to make good the losses sustained by another transport company, in which the Belgian State had a large interest, Mr. Chinn was forced to wind up his business. The United Kingdom brought a claim against Belgium for the loss and damage sustained by Mr. Chinn, alleging, *inter alia,* that the measures taken by the Belgian Government constituted a violation of the obligation, incumbent on all States, to respect the vested rights of foreigners in their territories. Whilst agreeing that such an obligation existed in international law, the Court found that, in the circumstances of the case, Mr. Chinn's original position characterized by the possession of customers and the possibility of making a profit, did not constitute a genuine vested right (pp. 87-88).

Compagnie Générale des Asphaltes de France Case (1903)
United Kingdom, Venezuela
United Kingdom-Venezuela Mixed Claims Commission: Umpire: Plumley (United States of America); Harrison (United Kingdom); Grisanti (Venezuela)
Reports of International Arbitral Awards, Vol. IX, p. 389

35. The Venezuelan Consul in Trinidad refused to clear the company's vessels for Venezuela unless he was paid in advance the full duties chargeable in Venezuela on the goods being imported into that country and unless passports were obtained from him before-

hand. He later refused to clear the company's ships on the ground that the company had complained to the British authorities and that the permit permitting him to clear vessels had been withdrawn. The Umpire held that the collection of import duties was " an act of Venezuelan sovereignty on British soil " and constituted " a just cause of offence " (p. 392). The responsibility of Venezuela for the consul's act was the same, whether it authorized and directed them, " or only ratified them by silence and acquiescence " (p. 396).

George W. Cook Case (1927)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 213

36. Cook purchased a number of postal money orders which the Mexican authorities refused to honour when he presented them within the due period. Mexico contended that the claim presented by the United States was barred under the Mexican Statute of Limitations. It was held that the United States was not debarred by virtue of Mexican law from pursuing its international claim in respect of the money wrongfully withheld. Although the nature of contractual rights is determined by local law, the responsibility of a Government is to be determined solely by reference to international law (pp. 214-215).

See also the *Hopkins* case, R.I.A.A., Vol. IV, p. 41 ; para. 43, *infra.*

Joseph E. Davies Case (1927)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 139

37. This claim for payment for legal services rendered under a contract made by the claimant with the agency of the *de facto* Mexican Government was allowed as regards the unpaid balance of the first year's salary, which was payable immediately on the conclusion of the contract (p. 141). The contract contained a clause expressly limiting the agent's authority to bind the incoming Mexican Government. The Commission held that the claimant was bound by this explicit notice as regards subsequent payments otherwise due under the contract (pp. 143-144).

De Sabla Case (1933)
Panama, United States
Panama-United States General Claims Commission: President : van Heeckeren (Netherlands); Alfaro (Panama); Root (United States of America)
Reports of International Arbitral Awards, Vol. VI, p. 358

38. Owing to the chaotic conditions of the land registries the Government of Panama had no knowledge of the precise extent of public lands. It therefore adopted a system of granting applications [for adjudication] of public land and calling upon the private owner, if any, to defend his title. A large number of such adjudications were granted in respect of property owned by the De Sabla family although, as the Commission found, the Government had knowledge of the precise extent of the De Sabla property. Panama contended that the system did not constitute expropriation by international standards since private owners were given an opportunity to defend their title. The Commission held that the large numbers of applications filed rendered it extremely difficult for the claimants to defend their title and that no adequate protection was in fact provided. Panama could not therefore avoid liability because of the claimants' failure to oppose each application (p. 363). In view of the fact that Panama had notice over a long period of the extent of the property owned by the claimants, the grant of adjudications and licences constituted wrongful acts for which Panama was internationally responsible (p. 366).

Deutz Case (1929)
Mexico, United States
Mexico-United States General Claims Commission; President: Sindballe (Denmark); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 472

39. The Mexican Government placed several orders for textiles with the firm of Deutz. Deutz rendered partial delivery but the Mexican Government refused to accept the goods, without giving any reason. The firm sold the goods at a loss and ceased further deliveries. The Commission held that Mexico was liable for breach of contract and should pay damages ; as to the delivered goods, the claimants were entitled to the difference between the contract price and the cost price, plus the loss suffered on resale, and, as to the undelivered goods, their loss of profit.

El Emporio Del Café Case (1926)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Parker (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 17

40. The Mexican Government submitted a claim on behalf of El Emporio del Café to recover export dues paid to United States authorities on goods exported during the occupation of Vera Cruz by the United States in 1914. The consignments concerned were reshipped to other parts of Mexico. The United States contended that the Commission lacked competence to consider the claim. The Commission held that, although it could not examine a claim that the United States authorities were not entitled to perform administrative acts in Vera Cruz, since that would constitute a controversy between the two Governments lying outside its jurisdiction, it could examine the pertinent acts of the United States authorities in order to determine whether they had inflicted any damage on

the rights of Mexican citizens. In the event that it was proved that the dues should be repaid under Mexican law, which the United States authorities had applied, then the claimant company was entitled to a refund.

Hemming Case (1920)

United Kingdom, United States

United Kingdom-United States Arbitral Tribunal: President: Fromageot (France); Fitzpatrick (United Kingdom); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 51

41. Hemming, an English lawyer, was engaged in 1894 by the United States Consul in Bombay in connexion with the prosecution of certain persons accused of counterfeiting United States coins. The United States contended that the Consul was not authorized to hire an attorney in this way. It was held that, since the United States had not objected to Hemming's employment at the time, although it had been aware of it, the United States was subsequently bound by the terms of the contract (p. 53).

Henriquez Case (1903)

Netherlands, Venezuela

Netherlands-Venezuela Mixed Claims Commission; Umpire: Plumley (United States of America); Hellmund (Netherlands), who was succeeded by Möller; Iribarren (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 713

42. The Umpire stated that, in accordance with the accepted rules of international law, for Venezuela to be held responsible for the seizure of goods or property the seizure must have been made through the Government's own authorities or by those who had a right to act in the name and on behalf of the Government, or by some one having authority to express the governmental will and purpose (pp. 714-715).

For a similar decision see the *Crossman* case, R.I.A.A., Vol. X, p. 356.

Hopkins Case (1926)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Parker (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 41

43. The United States presented this claim on behalf of Hopkins, a United States citizen, who had bought money orders issued by a *de facto* Mexican Government. After this régime had been overthrown the incoming Government annulled the acts of its predecessor and refused to pay the orders. The Commission held that the Government was bound to respect the validity of the acts of the *de facto* Government in so far as that Government had exercised real control over most of the country and had performed normal governmental acts (pp. 42-46). Since both these factors had been present, the Government was bound to honour the orders, which constituted a vested right held by an alien. The Commission held that it made no difference that this could enable aliens to enjoy rights against Mexico which were withheld from Mexican citizens under the latter's municipal law (pp. 46-47).

For similar decisions see the *Peerless Motor Car Company* case, R.I.A.A., Vol. IV, p. 203, and the *Patton* case, R.I.A.A., Vol. V, p. 224.

Illinois Central Railroad Company Case (1926)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Parker (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 21

44. The Illinois Central Railroad Company presented a claim for money due for the sale of railway engines to the Mexican National Railway. The Commission held that, upon an examination of international jurisprudence, there was no ground for stating that contract claims are cognizable only where denial of justice or some other form of government responsibility was involved. No general rule could be discovered " according to which mere non-performance of contractual obligations by a Government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the non-performance is accompanied by some feature of the public capacity of the Government as an authority " (p. 22). The Commission subsequently awarded damages against the Mexican Government for the railway engines which had been delivered (p. 134).

The Jessie, *the* Thomas F. Bayard *and the* Pescawha *Cases (1921)*

United Kingdom, United States

United Kingdom-United States Arbitral Tribunal: President: Fromageot (France); Fitzpatrick (United Kingdom); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 57

45. Three British vessels, the *Jessie, Thomas F. Bayard* and *Pescawha,* were seized by a United States revenue cutter while hunting sea otters in a fur-sealing zone of the North-East Pacific. The firearms and ammunition found on board were sealed by the United States officials. The United States contended that the American officer had acted in the *bona fide* belief that his action was authorized under an agreement between Great Britain and the United States designed to protect fur seals. It was admitted that no such agreement existed at the date of the seizure. The Tribunal stated that,

> " . . . any Government is responsible to other Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands " (p. 59).

A similar decision was reached in the *Wanderer* case, R.I.A.A., Vol. VI, p. 68, where the United States was held liable for the seizure of a British ship by United

States authorities who purported to act under an authorization granted by a British statute. The Tribunal found that the United States officials had acted outside the ambit of the authority delegated to them by the statute.

46. In the *Coquitlam* case, R.I.A.A., Vol. VI, p. 45, a British ship had been seized by a United States customs officer in the belief that United States revenue laws had been infringed ; it was later determined by a United States court that no infringement had in fact occurred. The Tribunal held that the United States was liable for the error of judgement shown by the official, despite the fact that he had had reasonable cause to believe that the revenue laws had been infringed (p. 47).

Cf. the *Tattler* case, R.I.A.A., Vol. VI, p. 48.

Lalanne and Ledoux Case (1902)

France, Venezuela

France-Venezuela Mixed Claims Commission : Umpire : Plumley (United States of America); Rocca (France); Paul (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 17

47. A Venezuelan official, acting in his capacity as an active member of a commercial firm, refused to grant the necessary clearance to enable the claimants to make a shipment of cattle. The Commission found that the official's act amounted to " an abuse of authority ", which had been sustained by the local customs officer. This use of public authority in order to obtain pecuniary benefits was held to entail the responsibility of Venezuela which was required to pay an indemnity to the claimants (p. 18). See the *Ballistini* case, R.I.A.A., Vol. X, p. 18, for a similar case based on the same incident.

Landreau Claim (1922)

Peru, United States

Arbitrators : Prevost (Peru) ; Finlay (United Kingdom) ; Smith (United States of America)

Reports of International Arbitral Awards, Vol. I, p. 347

48. This was a claim brought by the United States on behalf of the heir and assigns of John Célestin Landreau, a United States citizen, arising out of a Peruvian decree of 1865 providing for the payment of a reward to John Théophile Landreau, the brother of Célestin, for the discovery of guano deposits, and out of contracts entered into by the two brothers in 1859 and 1875.

49. In 1865 the Peruvian Government published a decree in which it agreed to enter into a contract with Théophile Landreau and to pay him a reward for the discovery of guano deposits. Under various agreements between the two brothers Célestin was to receive a share of the reward. In 1868, after Théophile had submitted a list of discoveries, the Peruvian Government declared the contracts entered into in 1865 void and offered the reward on different terms. The Tribunal declared that " ... no authority has been produced for the proposition that the Government could justifiably put an end to a contract such as that of 1865 " (p. 356). The Tribunal found, however, that Célestin, unlike Théophile, had accepted the cancellation of the 1865 contract. The claim by Célestin's representatives in respect of the breach of that contract failed accordingly. On the other hand the Peruvian Government never established the basis for the new contract, as provided under the 1868 decree, and took advantage of Théophile's discoveries by working for its own benefit the guano deposits which he had located. " From this ", declared the Tribunal, " there inevitably follows a liability to pay to Théophile Landreau, his representatives and assigns the fair value of the discoveries so communicated " (p. 364). The Tribunal held that the Government was bound to pay on a *quantum meruit* basis for the discoveries which it had appropriated for its own benefit. (*ibid.*)

William A. Parker Case (1926)

Mexico, United States

Mexico-United States General Claims Commission : President : van Vollenhoven (Netherlands) ; Macgregor (Mexico) ; Parker (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 35

50. Parker, a United States citizen, submitted a claim in respect of certain goods which he had sold to various Government departments in Mexico. The Mexican Government challenged the claim, on the grounds (among others) of the alleged inadequacy of proof submitted by Parker and the [lack of] power of the individual officials who had purported to represent and bind the Mexican Government in entering into the contracts in question. The Commission held that the facts alleged were within the special knowledge of the Government, which should make a full disclosure. In any case " ... whether the individuals to whom deliveries were made had, or had not, authority to contract for Mexico, certain it is that if the respondent actually received and retained for its benefit the property which the claimant testifies he delivered to it, then it is liable to pay therefor under a tacit or implied contract even if the individual to whom delivery was made had neither express nor apparent authority to contract for it " (p. 40).

Rudloff Case (1903)

United States, Venezuela

United States-Venezuela Mixed Claims Commission : Umpire : Barge (Netherlands) ; Bainbridge (United States of America) ; Paul (Venezuela)

Reports of International Arbitral Awards, Vol. IX, p. 244

51. Rudloff entered into a building contract with the Venezuelan minister of public works and the governor of the Federal district, both of whom had been authorized by the chief of the Executive to conclude contracts of the kind in question. Work was halted by order of the Venezuelan authorities. The Commission held that the contract was binding on the Venezuelan Government which was liable for the wrong done (pp. 257-258). A claim for the expected profits of the venture was

disallowed on the grounds that any damage so sustained was merely speculative (p. 259).

Venable Case (1927)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 219

52. Mexico was held responsible for the acts of a railway official in violating the contractual rights of the claimant, despite the fact that the official did not know of the existence of the rights in question. " Direct responsibility for acts of executive officials does not depend on the existence on their part of aggravating circumstances such as outrage, wilful neglect of duty, etc." (p. 224).

(C) JUDICIAL ORGANS

Ambatielos Case, Merits: Obligation to Arbitrate (1953)
Greece v. United Kingdom
International Court of Justice Reports, 1953, p. 10

53. After an earlier decision (*I.C.J. Reports, 1952*, p. 28) in which the Court had held that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit to arbitration its dispute with the Greek Government over the Ambatielos claim, the Greek Government requested the International Court to hold that the United Kingdom was under such an obligation under the terms of certain treaty provisions between the two countries. The Court was only concerned, therefore, with determining whether a sufficient connexion existed between the treaty provisions and the claim presented on behalf of Mr. Ambatielos, a Greek national, by his Government, as to give rise to an obligation to arbitrate; it did not enter into the merits of the claim as such. However, in the course of the proceedings the United Kingdom advanced a number of arguments designed to show that the facts alleged by the Greek Government, if true, would amount to a denial of justice, and that an allegation of denial of justice must be based on general principles of international law and could not be premised on the provisions of a Treaty of Commerce and Navigation entered into in 1886 and designed to provide " most-favoured-nation " treatment between nationals of the two countries (p. 21). In reply, the Greek Government argued that "most-favoured-nation" treatment included the administration of justice and equity on a par with that shown to nationals of other States. The Parties also disputed the meaning to be given to the phrase " free access to Courts of Justice " used in the Treaty. The United Kingdom asserted that this meant access on an equal footing with that enjoyed by British subjects, whilst the Greek Government claimed that it entailed judicial freedom from restrictions imposed by the executive authorities and that, when Mr. Ambatielos had presented his claim, vital evidence had been withheld by the executive authorities (p. 22). The Court concluded that, having regard to the terms of the Treaty and the arguments put forward, the claim presented by the Greek Government was based on the provisions of the 1886 Treaty and gave rise to an obligation to arbitrate binding on the United Kingdom.

John Chase Case (1928)
Mexico, United States
Mexico-United States General Claims Commission: President: Sindballe (Denmark); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 337

54. Mexico was found responsible for a denial of justice in not pursuing the case against a Mexican named Flores, who had had an argument with Chase which had ended in Chase being shot; it was not determined whether or not Flores had acted in self-defence. The Commission held that the failure of the court to pursue the matter or to give a decision after some fourteen years had elapsed involved the international responsibility of Mexico.

See also the *Fabiani* case, R.I.A.A., Vol. X, p. 83, where it was held that judicial delay may constitute a denial of justice.

Chattin Case (1927)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 282

55. Chattin was arrested on a charge of embezzlement and sentenced to two years' imprisonment by a Mexican court. The United States alleged that the arrest, trial and sentence amounted to a denial of justice. The Commission distinguished cases of so-called indirect liability, where the judicial authorities failed to take proper steps after an alien had been wrongfully damaged, whether by a private citizen or by an executive official, from instances of direct responsibility incurred on account of the acts of the Government itself, or its officials, unconnected with any previous wrongful act of a citizen. When the acts of the judiciary fell in this category the expression " denial of justice " became inappropriate since the basis of resulting claims was the injustice done by the courts themselves, not their failure to provide redress for a wrong already done (pp. 285-286). The importance of the distinction lay in the fact that in cases of direct responsibility involving the executive and legislative branches the Government was liable even in the absence of bad faith, wilful neglect or other obvious insufficiency of action. In the case of the judiciary, however, bad faith or other manifestly insufficient action was required in respect of both categories of responsibility, as determined according to international standards (pp. 287-288). The Commission found that there had been an " astonishing lack of seriousness on the part of the Court " (p. 292). The

accused had not been informed of the charge and there had been no attempt to secure the principal items of evidence or major witnesses, nor to conduct a proper examination. The Commission concluded that the criminal proceedings had been far below the international standard and that Mexico should accordingly be held liable.

See also the *Parrish* case, R.I.A.A., Vol. IV, p. 314.

Chazen Case (1930)

Mexico, United States

Mexico-United States General Claims Commission: President: Alfaro (Panama); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 564

56. Mexico was held liable for the delay which occurred between Chazen's arrest on a charge of smuggling and the date when he was handed over to the judicial authorities, although the arrest itself was found to be lawful (pp. 568-569). A second claim was presented in respect of the merchandise on which Chazen had failed to pay duty and which was auctioned after the expiry of the time limits prescribed by Mexican law. The Commission held that, " . . . this delay cannot give rise to international responsibility, since in order that a particular formality of a proceeding which in general has been followed in strict accordance with the law, may cause such responsibility, it must be shown that it is cause of the failure of the general proceedings to do justice, or, that it be shown that such particular formality causes in itself an injury to the claimant " (p. 572).

De Galván Case (1927)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 273

57. The United States was held liable for the failure of Texas courts to prosecute the murderer of a Mexican subject. The murderer was indicted by a grand jury but never brought to trial during a period of six years.

For a similar decision see the *Richards* case, R.I.A.A., Vol. IV, pp. 275-277.

El Oro Mining and Railway Company Case (1931)

Mexico, United Kingdom

Mexico-United Kingdom Claims Commission: President: Zimmerman (Netherlands); Flores (Mexico); Stoker (United Kingdom)

Reports of International Arbitral Awards, Vol. V, p. 191

58. Mexico was found liable on grounds of an undue delay of justice on the part of the Mexican courts, despite the existence of a Calvo clause in the concessionary contract held by the claimant. The Mexican courts failed to give any hearing or to make an award, despite the lapse of nine years since application was made in respect of the claimant's losses.

Garcia and Garza Case (1926)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 119

59. This claim was presented by the Mexican Government on behalf of the parents of a Mexican girl who was shot, whilst crossing the Rio Grande on a raft, by a United States officer who suspected that she was engaged in liquor smuggling. The officer was court martialled and sentenced to be dismissed from military service; however, the President of the United States reversed the findings of the court martial and restored the officer to duty. The crossing of the river was illegal under the laws of both countries at the place in question.

60. The Commission held that the problem before it, namely whether, under international law, the American officer was entitled to shoot in the direction of the raft, was to be determined solely by reference to the international standard regarding the taking of human life (p. 120). The officer was found to have acted in violation of that standard having regard to the lack of proportion between his resort to firearms, so as to endanger human life, and the supposed offence, and that the United States should pay damages accordingly (pp. 121-122). The Commission dismissed a Mexican allegation that there had been a denial of justice in the reversal of the decision of the court martial. " In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency " (p. 123).

Kennedy Case (1927)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 194

61. Kennedy was fired upon by a Mexican with the result that he had to spend several months in hospital and was permanently crippled. His assailant was sentenced to two months' imprisonment, the judge's decision not being in full accordance with Mexican law. It was held that the serious negligence on the part of the judge and the inadequacy of the punishment constituted a denial of justice for which Mexico was liable (p. 198).

The Case of the S.S. Lotus *(1927)*

France v. Turkey

Permanent Court of International Justice, Series A, No. 10.

62. Under the Treaty of Lausanne it was provided that, as between Turkey and the other contracting Powers, questions of personal jurisdiction should be decided in accordance with the principles of international law. The French ship *Lotus* collided with the *Boz-Kourt,* a Turkish vessel, on the high seas. When the *Lotus* arrived at a Turkish port criminal proceedings were instituted against the French officer who had been in charge of the ship at the time of the collision. The French Government protested on the ground that this exercise of jurisdiction was contrary to international law.

63. In considering the case the Court dealt with the possibility of an error in municipal law, or of a lack of conformity between the municipal provision applied and international law. The Court stated that :

> " The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises " (p. 24).

Martini Case (1930)

Italy, Venezuela

Arbitrators : Tumedei (Italy) ; Unden (Sweden) ; Alfaro (Venezuela)

Reports of International Arbitral Awards, Vol. II, p. 975

64. In 1898, the Venezuelan Government granted a railroad and mining contract to Martini and Company, the partners of which were Italian subjects. In 1902, the Company suspended operations owing to revolutionary disturbances. In 1904, the Company was awarded damages for the loss incurred as a result of the disturbances by an Italian-Venezuelan Mixed Claims Commission (Ralston, Arbitrator). The Government then brought an action against the Company before the Venezuelan Courts for breach of contract. In 1905, the Federal Court of Cassation cancelled the concession and awarded damages against the Company. The Italian Government took up the claim and under an arbitration agreement concluded in 1920 it was agreed that the Arbitrators should be asked to decide whether the decision of the Venezuelan Court amounted to a denial of justice or manifest injustice, or a violation of an Italian-Venezuelan Treaty providing for equality of treatment of the nationals of each country.

65. The Arbitrators held that, although they were unable to determine whether or not the Court's judgement was erroneous or unjust on a basis of the arguments and facts presented to the Court (pp. 988-994) nevertheless the decision constituted a breach of an international obligation imposed on Venezuela as a result of the earlier arbitral award.

> *" D'après les règles admises pour la responsabilité des Etats, le Venezuela est par conséquent responsable si l'attitude d'un tribunal vénézuelien est incompatible avec une sentence arbitrale internationale prononcée conformément à un traité international dont le Venezuela est partie contractante "* (pp. 995-996).

The Tribunal therefore concluded that the decision of the Venezuelan Court was manifestly unjust under the arbitration agreement (pp. 994-996). On the measure of damages, see para. 186 *infra.*

Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory (1932)

Permanent Court of International Justice Series A/B, No. 44

66. The Court was asked to give an advisory opinion on the question whether the treatment of Polish nationals in Danzig was to be determined by reference to international treaty obligations binding on Danzig or also by reference to the Constitution of Danzig. The Court observed that, in the same way as a State cannot rely as against another State on the latter's Constitution, but only on international law and international obligations duly accepted, so a State cannot adduce its own Constitution with a view to evading international obligations incumbent upon it under international law or treaties in force (p. 24). The Court accordingly concluded that the treatment to be afforded to Polish nationals by Danzig was to be determined exclusively on a basis of international law and the treaty provisions in force. This general conclusion was distinguished, however, from the possibility of a case of denial of justice arising out of the application of the Danzig Constitution or of a decision of the Danzig courts, where international responsibility would arise not from the Constitution and other laws as such, but from their application in violation of the rules of international law (pp. 24-25).

(D) Members of armed forces

J. B. Claire Case (1929)

France, Mexico

French-Mexican Claims Commission : President : Verzijl (Netherlands) ; Ayguesparsse (France) ; Roa (Mexico)

Reports of International Arbitral Awards, Vol. V, p. 516

67. Claire was shot after failing to provide a sum of money which two Mexican army officers demanded. Mexico denied liability on a number of grounds, claiming that the officers were bandits or members of insurrectionary forces, whose acts fell outside the Convention, or that, if they were revolutionary soldiers for whom Mexico was responsible under the Convention, no responsibility was incurred owing to the private nature of the acts in question. The President of the Claims Commission held that the general principles of law in relation to State responsibility must be regarded in the light of the doctrine of objective responsibility, under

which a State might incur responsibility despite the absence of any fault on its part. A State was responsible for all acts constituting delinquencies under international law committed by its officials or organs, irrespective of whether or not the officials or organs concerned had acted within the limits of their competence. However, in order to justify the admission of the doctrine of objective responsibility in respect of acts committed by officials outside their competence, it was necessary that they should have acted, at least apparently, as authorized officers, or that, in acting, they should have exercised powers connected with their official duties. Accordingly, Mexico was liable for the acts of the two officers despite the private nature of their crime (pp. 528-532).

Earnshaw and Others : The Zafiro *Case (1925)*
United Kingdom, United States
United Kingdom-United States Arbitral Tribunal : President : Nerincx (Belgium) ; Fitzpatrick (United Kingdom) ; Pound (United States of America)
Reports of International Arbitral Awards, Vol. VI, p. 160

68. The *Zafiro,* which had been recently registered as an American merchant vessel, was used as a supply ship in connexion with United States naval operations during the Spanish-American war. Whilst in port at Cavite, in the Philippines, the crew looted private property belonging to British nationals. The United States contended that the vessel was not a public ship for whose conduct the United States could be held liable. The Tribunal found that the vessel formed part of United States forces and was under the command of a United States naval officer. The Tribunal distinguished between sending sailors ashore " in a policed port where social order is maintained by the ordinary agencies of government ", and the circumstances of the present case, where " the nature of the crew, the absence of a régime of civil or military control ashore, and the situation of the neutral property " called for diligence to be exercised. The United States was held liable for failure to provide effective control of the crew and ordered to pay damages for all the damage done, despite the fact that some portion of it had been caused by unknown wrongdoers who did not form part of the crew. In view of this circumstance, however, no interest was awarded on the claims (pp. 163-164).

See also the *Diaz* case, R.I.A.A., Vol. VI, p. 341, where the United States was held liable " under international law " for the acts of United States sailors who trespassed in the claimant's coco-nut plantation and took and consumed coco-nuts.

Falcón Case (1926)
Mexico, United States
Mexico-United States General Claims Commission : President : van Vollenhoven (Netherlands) ; Macgregor (Mexico) ; Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 104

69. Falcón, a Mexican citizen, was shot by United States soldiers whilst bathing in the Rio Grande. The soldiers suspected Falcón of smuggling and ordered him to halt ; when he failed to do so they fired a shot in the air. They were then fired on from the other side of the river and Falcón was killed in the ensuing exchange. The United States authorities did not bring the two soldiers concerned to trial and declared that they had been acting in the discharge of their duty ; even if they had erred in firing the first shot, the subsequent firing had been in self-defence. The Commission held that the use of firearms was a wrongful act, contrary to United States military regulations, and the United States was liable to pay damages.

For a similar case regarding shooting by a soldier see the *Garcia and Garza* case, R.I.A.A., Vol. IV, pp. 120-122 ; see paras. 59-60 *supra.*

Gordon Case (1930)
Mexico, United States
Mexico-United States General Claims Commission : President : Alfaro (Panama) ; Macgregor (Mexico) ; Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 586

70. Mexico was held not liable for the acts of two Mexican officers who injured an American citizen whilst they were engaged in shooting practice. The two officers were acquitted by a civil court since it could not be proved which of them had caused the injury. The Commission found that the act in question was outside the line of service and was a private act for which Mexico was not directly responsible. " The principle is that the personal acts of officials not within the scope of their authority do not entail responsibility upon a State " (p. 588). The acquittal of the two officers was held not to constitute a denial of justice.

Cf. the *Morton* case, R.I.A.A., Vol. IV, p. 428.

Kling Case (1930)
Mexico, United States
Mexico-United States General Claims Commission : President : Alfaro (Panama) ; Macgregor (Mexico) ; Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 575

71. Mexico was held responsible for the shooting of a United States citizen by Mexican troops, after shots had been fired in the air for fun by several of the American's companions. The Commission declared that, in the circumstances, the action of the troops had been " indiscreet, unnecessary and unwarranted " (p. 580). The behaviour of the American in firing into the air was regarded as imprudent and damages were mitigated accordingly (p. 585).

Kunhardt and Co. Case (1903)
United States, Venezuela
United States-Venezuela Mixed Claims Commission : Umpire : Barge (Netherlands) ; Bainbridge (United States of America) ; Paul (Venezuela)
Reports of International Arbitral Awards, Vol. IX, p. 171

72. The Commission held that the destruction or removal of property by soldiers gave rise to a right to

compensation whenever it could be shown that the act had been done in the presence of superior officers who could have prevented the outrage but failed to do so p. 178).

For a similar decision see the *Irene Roberts* case, R.I.A.A., Vol. IX, pp. 206-208.

Maninat Case (1902)

France, Venezuela

France-Venezuela Mixed Claims Commission : Umpire : Plumley (United States of America); Rocca (France); Paul (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 55

73. Maninat was ordered to present himself at the headquarters of a general commanding a division of the Venezuelan army. He was there struck and injured, by order of the general, and imprisoned, without any justifying reasons. The Venezuelan Government failed to reprove the general, or the officers under him who inflicted the wounds, when the matter was brought to its attention. It was held that Venezuela was responsible for the fatal injuries inflicted on Maninat and compensation was awarded to the surviving French heir (pp. 79-81).

Solis Case (1928)

Mexico, United States

Mexico-United States General Claims Commission : President : Sindballe (Denmark); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 358

74. The United States presented a claim on behalf of Solis in respect of cattle taken from his ranch both by insurgent and by regular forces. The claim was rejected as regards the acts of revolutionary forces in view of the extent of the revolt and the absence of negligence on the part of the Mexican authorities (p. 362). The claim based on the acts of regular troops succeeded. About 100 soldiers had been stationed on the ranch for a month and it could not be presumed that they were all stragglers, no longer under the command of an officer (pp. 362-363).

Spanish Zone of Morocco Claims (1925)

Spain, United Kingdom

Rapporteur : Huber (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 615

75. Referring to the question of responsibility for damage caused during military operations, the Rapporteur stated that, although a State is not responsible for acts committed by its troops in the course of restoring order or when fighting an enemy, international jurisdiction may be invoked in a case of manifest abuse of the exercise of military powers and that a State is bound to exercise special supervision to prevent its troops from committing acts in violation of military law and discipline (p. 645).

Stephens Case (1927)

Mexico, United States

Mexico-United States General Claims Commission : President : van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 265

76. Stephens was shot by a sentry belonging to certain auxiliary forces after the car in which he was travelling failed to stop. The sentry, who had not given any warning of his intention to fire, was arrested but later released. The officer who permitted his release was sentenced to imprisonment but acquitted on appeal. The Commission held that Mexico was directly responsible for the reckless use of firearms on the part of the sentry ; members of the auxiliary forces were to be considered as soldiers despite their irregular status (p. 267). Mexico was also held liable for denial of justice in that neither the sentry nor the officer were punished (p. 268).

Youmans Case (1926)

Mexico, United States

Mexico-United States General Claims Commission : President : van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 110

77. Three United States citizens were killed by a Mexican mob in 1880 after a dispute with a labourer. The mayor of the town sent a State lieutenant, together with troops, to quell the riot. The troops, instead of dispersing the mob, opened fire on the house in which the Americans had taken refuge and killed one of them. The other two were then killed by troops and members of the mob. Eighteen persons were subsequently arrested, though none was sentenced, and five were convicted *in absentia*. The Commission held that the record showed " a lack of diligence in the punishment of the persons implicated in the crime " (p. 115). As regards the participation of the troops, the Commission held that this imposed a direct responsibility on the Mexican Government ; in view of the fact that the troops were on duty and under the immediate supervision of their commanding officer they could not be said to have acted in their private capacity. " Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts " (p. 116).

See also the *Connelly* case, R.I.A.A., Vol. IV, p. 117.

(E) POLICE ORGANS

(i) *Members of police force*

Adams Case (1933)

Panama, United States

Panama-United States General Claims Commission: President: van Heeckeren (Netherlands); Alfaro (Panama); Root (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 321

78. Adams was robbed and assaulted by a Panamanian policeman whilst the latter was on duty. The policeman was dismissed from the force and sentenced to ninety days' imprisonment for breach of discipline and of the police regulations. Criminal proceedings were not pursued, although the policeman was held for some ten weeks during preliminary investigations.

79. Panama was held liable for failure to punish the policeman adequately. The Commission did not find it necessary " to pass upon the question of whether a State is liable for the wrongful act of a police officer irrespective of failure to punish, or of whether the rule regarding liability for the acts of police applies in a case like this where the officer being on duty and in uniform does an act clearly outside of his duty and inconsistent with his duty to protect " (p. 323).

Baldwin and Others Case (1933)

Panama, United States

Panama-United States General Claims Commission: President: van Heeckeren (Netherlands); Alfaro (Panama); Root (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 328

80. The United States presented a group of claims in respect of injuries sustained by a number of American soldiers and one civilian during a riot which broke out in the Cocoa Grove district of the City of Panama in the course of a carnival. The United States authorities provided a military patrol but Panamanian police retained primary responsibility for the maintenance of law and order. The Commission found that, although some American soldiers had behaved improperly, this did not justify the Panamanian police in attacking the soldiers or allowing civilians generally to do so, particularly as there had been sufficient police present to control the situation. Since the United States patrol was found to have performed its task efficiently, the Commission did not have to consider whether the rights of claimants would have been impaired if the patrol had been insufficient. Responsibility for the maintenance of order rested with the territorial sovereign (p. 331).

81. In the *Richeson, Klimp, Langdon and Day* case, R.I.A.A., Vol. VI, p. 325, a number of Americans were injured in a fight between Panamanian citizens and American soldiers and one, Langdon, shot by an unidentified Panamanian policeman. The Commission found that Langdon's death was attributable to inadequate police protection and improper police action. An award was made, expressed as " the very minimum of the reparation due ", despite the fact that none of Langdon's heirs were financially dependent on him (p. 327).

Cesarino Case (1903)

Italy, Venezuela

Italy-Venezuela Mixed Claims Commission: Umpire: Ralston (United States of America); Agnoli (Italy); Zuloaga (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 598

82. The Government of Venezuela was held liable for the wanton act of a police official who shot an Italian subject, the killing being, in the words of the Umpire, " utterly causeless, while deliberate ".

Mallén Case (1927)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 173

83. This claim was put forward by the Government of Mexico on behalf of Mallén, a Mexican consul, who had twice been assaulted by an American policeman. On the first occasion, when the policeman threatened to kill Mallén and struck him, the policeman was fined $5 for disturbing the peace. It was held that this sentence in itself did not amount to a denial of justice. The United States authorities were held to have acted improperly, however, in failing to punish the policeman or to warn him of the consequences of repeating his misconduct (p. 175). Mallén was severely injured by the second assault and taken to the county gaol; the Commission held that the policeman's act was an official one which entailed liability on the part of the American authorities (p. 177). The policeman was fined $100 for the second assault. The Commission determined that, although the decision of the American court could not be said to amount to a denial of justice having regard to the nature of the evidence presented to it, nevertheless a denial of justice arose from the fact that the policeman had not paid the fine, and had not been imprisoned (the alternative penalty). " Punishment without execution of the penalty constitutes a basis for assuming a denial of justice " (p. 178). It was recognized that in principle special damages should be awarded in respect of the indignity suffered, lack of protection and denial of justice, in addition to compensation for the physical injuries, although the high sums awarded in the past in order to uphold consular dignity had been in cases where the country's honour had been involved, or " to consuls in backward countries where their position approaches that of a diplomat " (pp. 179-180).

See also *Chapman* case, R.I.A.A., Vol. IV, p. 632, where it was held that Mexico was liable for a failure to provide the special protection due to a consular officer.

Roper Case (1927)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 145

84. The Mexican Government was held responsible for the shooting of an American subject by Mexican police on the ground that, in accordance with the principles underlying the Commission's decisions in the *Swinney, Falcón* and *Garza* cases, the use of firearms had been reckless and unnecessary (pp. 146-147). The Commission rejected a contention that the Mexican Government should not be held responsible for the acts of such minor officials as policemen. The Commission held that it was entitled to examine the investigation of the occurrence held by a Mexican judge, which it found to have been inadequate (pp. 147-148).

85. In the *Swinney* case, R.I.A.A., Vol. IV, p. 101, Swinney was shot by two Mexican officials when in a boat on the Rio Grande; it was not clear whether the officials had acted in self-defence or in the discharge of their official duties. It was held that Mexico was liable to pay damages for the failure to hold an open trial.

(ii) *Arrest and imprisonment*

Colunje Case (1933)
Panama, United States
Panama-United States General Claims Commission: President: van Heeckeren (Netherlands); Alfaro (Panama); Root (United States of America)
Reports of International Arbitral Awards, Vol. VI, p. 342

86. Colunje was induced by the false pretences of a Canal Zone detective to come to the Canal Zone, where he was arrested on a criminal charge. He was released on a bond after several hours' imprisonment. The case against him was dismissed after the District Attorney had entered a *nolle prosequi* and his bond was returned to him. It was held that the United States was responsible for the illegal arrest of Colunje. " It is evident that the police agent of the Zone by inducing Colunje by false pretences to come with him to the Zone with intent of arresting him there unduly exercised authority within the jurisdiction of the Republic of Panama to the prejudice of a Panamanian citizen, who, as a result thereof, suffered the humiliation incident to a criminal proceeding. For this act of a police agent in the performance of his functions, the United States of America should be held responsible " (pp. 343-344).

Chevreau Case (1931)
France, United Kingdom
Arbitrator: Beichman (Norway)
Reports of International Arbitral Awards, Vol. II, p. 1113

87. France presented a claim on behalf of Chevreau, a French citizen, who was arrested by British troops in 1918 in the course of military operations conducted in Persia with the consent of the Persian Government. The Arbitrator held that the arrest was itself lawful, having regard to the need of the British forces to take necessary measures to protect themselves against harmful acts, and that Chevreau had not been maltreated during his detention. He found, however, that the British Government had failed to initiate proper inquiries into the accuracies of charges on which Chevreau had been arrested (p. 1129), and was accordingly liable to pay for the moral and material injury suffered.

Cibich Case (1926)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Parker (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 57

88. Cibich was arrested by the Mexican police for drunkenness. His money, which had been taken by the police for safe custody, was stolen by a gang of liberated prisoners and faithless policemen. The claim for the recovery of the money was dismissed on the ground that the claimant had been legally taken into custody and the evidence failed to show any lack of reasonable care on the part of the Mexican authorities.

Faulkner Case (1926)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 67

89. Mexico was held liable for the " apparent international insufficiency " of the treatment given to Faulkner whilst in prison, and ordered to pay damages (p. 71).

See also the *Adler* case, R.I.A.A., Vol. IV, p. 74.

Quintanilla Case (1926)
Mexico, United States
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 101

90. This claim was presented by Mexico on behalf of the parents of Quintanilla, a Mexican who was arrested by a deputy sheriff in Texas after an incident in which he had lassoed a girl on horseback and thrown her from the horse. Quintanilla's corpse was found by the side of the road several days later. The deputy sheriff and one of his assistants were arrested, but released on bail. The case was submitted to a grand jury, which failed to take any action. The Commission held that the United States was liable to pay damages in respect of an international delinquency; a State is under a duty to account for an alien taken into custody by a State official (p. 103).

91. See also the *Turner* case, R.I.A.A., Vol. IV, p. 278. " If having a man in custody obligates a Government to account for him, having a man in *illegal* custody doubtless renders a Government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty " (p. 281). (Italics in the original.)

Kalklosh Case (1928)

Mexico, United States

Mexico-United States General Claims Commission: President: Sindballe (Denmark); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 412

92. The Commission held that Kalklosh's arrest without warrant or other legal authority and without evidence indicating that he was guilty of any crime constituted a denial of justice for which Mexico was liable.

For a closely similar claim see the *Clark* case, R.I.A.A., Vol. IV, p. 415.

Koch Case (1928)

Mexico, United States

Mexico-United States General Claims Commission: President: Sindballe (Denmark); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 408

93. The Commission held that Mexico was liable for the acts of Mexican customs officials who, without uniform, boarded Koch's vessel and brutally attacked him in the course of arrest.

Harry Roberts Case (1926)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 77

94. Roberts was arrested and detained in prison for nearly nineteen months on a charge of house assault. A claim was presented on the grounds of his prolonged detention and of cruel and inhuman treatment during imprisonment. As regards his detention (pp. 79-80), the Commission held that although no fixed period was prescribed by international law, the imprisonment was excessively long. The period violated that laid down by Mexican law and it was no defence that, if he had been condemned, his previous imprisonment would have been taken into account. The Commission held that, on the evidence, the treatment given to Roberts whilst in prison was cruel and inhuman. It dismissed the argument of the Mexican Government that the treatment was the same as that given to nationals. The test to be observed was an international one (p. 80). Roberts was accordingly awarded damages.

Tribolet Case (1930)

Mexico, United States

Mexico-United States General Claims Commission: President: Alfaro (Panama); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 598

95. Tribolet was arrested by Mexican soldiers on a charge of having participated in a robbery in which a Mexican had been killed. Mexico was held responsible for his execution two days later, without trial or investigation, and without having been given an opportunity to defend himself.

See also the *Dillon* case, R.I.A.A., Vol. IV, p. 368.

(iii) *Due diligence and the punishment of offenders*

The Borchgrave Case (Preliminary Objections) (1937)
Belgium v. Spain

Permanent Court of International Justice, Series A/B, No. 72

96. Belgium alleged that the responsibility of the Spanish Government was involved on account of the murder of Baron de Borchgrave, an employee of the Belgian Embassy in Madrid, and by reason also of a failure to use sufficient diligence in the apprehension and prosecution of the persons guilty of the offence. The Spanish Government claimed that the Court lacked jurisdiction under the Special Agreement signed by the two States to consider the second allegation. The Court determined, however, on a basis of the interpretation of the Special Agreement, that it might determine the question of the alleged lack of due diligence. An objection put forward by the Spanish Government, that local remedies had not been exhausted, was withdrawn. The two States subsequently agreed to discontinue the case.

Canahl Case (1928)

Mexico, United States

Mexico-United States General Claims Commission: President: Sindballe (Denmark); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 389

97. The Federal Government of Mexico was held responsible for failure to punish the murderers of Canahl although the territory where the act took place had been under the command of revolutionary forces at the time the act occurred. Control of the territory changed hands some three weeks after the murder had been committed.

Janes Case (1925)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 82

98. Janes, the superintendent of a United States mining company operating in Mexico, was shot by a Mexican

employee who had been discharged. The killing took place before a considerable number of people. The local police chief, who was promptly informed of the murder, took half an hour to assemble his men and insisted that they should be mounted. The pursuers failed to catch the murderer who had gone off on foot. The murderer spent a week at a ranch six miles away and was then reported to have moved some seventy miles further south. This information was communicated to the Mexican authorities without result. The Commission declared that there had been " ... clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity " (p. 85).

99. The United States claimed $25,000 in respect of the loss and damage suffered by Janes's widow and children. In determining the measure of damages (pp. 86-90) the Commission distinguished between the individual liability of the culprit and that of the State. " The culprit is liable for having killed or murdered an American national ; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender " (p. 87). Accordingly, whilst the damage caused by the culprit was that done to Janes's relatives, the damage caused by the Government's negligence was that resulting from the non-punishment of the murderer. The Commission held that the case before them was an instance of denial of justice and that, " in cases of improper governmental action of this type, a nation is never held to be liable for anything else than the damage caused by what the executive or legislature committed or omitted itself " (p. 88). The Commission concluded that the indignity done to the relatives of Janes by non-punishment had been a damage directly caused by the Government. In determining the measure of damages, however, the Commission held that not only should the individual grief of the claimants be taken into account, but also " a reasonable and substantial redress... for the mistrust and lack of safety, resulting from the Government's attitude " (p. 89). In view of all the elements involved, the Commission awarded $12,000, without interest, on behalf of the claimants. On the measure of damages, see para. 177 *infra.*

In the *Spanish Zone of Morocco Claims, Claim No. 39, Menebhi Claim,* R.I.A.A., Vol. II, pp. 707-710, it was held that Spain should pay one half of a ransom paid for the release of cattle in view of the fact that the Spanish authorities took no action to bring the raiders to justice after being officially notified of the offence.

Massey Case (1927)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 155

100. A Mexican subject was arrested and imprisoned for killing Massey. The accused managed to escape from prison with the help of the assistant gaol-keeper. The gaol-keeper was arrested but the Mexican authorities did not succeed in apprehending the murderer. Mexico objected to the claim on the ground that Massey's own misconduct had contributed to his death. This argument was rejected as immaterial to the right of the United States to invoke the rule of international law requiring Governments to take proper measures to punish nationals who have committed wrongs against aliens (p. 156). Secondly, Mexico argued that no denial of justice arose from the acts of a minor official, acting in violation of law and of his own duty, if the State concerned punished him. The American Commissioner, for the Commission, held that a " nation must bear the responsibility for the wrongful acts of its servants " irrespective of their role or status under domestic law (p. 159). Since the assistant gaol-keeper, though arrested for a time, was not punished and no effective action appeared to have been taken to apprehend the murderer, Mexico was found responsible for denial of justice.

See also the *Way* case, R.I.A.A., Vol. IV pp. 391-400 ; *Stephens* case, R.I.A.A., Vol. IV, pp. 265-268 ; para. 76 *supra* ; and *Youmans* case, R.I.A.A., Vol. IV, pp. 110-115 ; para. 77 *supra.*

Neer Case (1926)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 60

101. This claim was presented by the United States on behalf of the heirs of Neer, who had been shot by a number of armed men. It was alleged that there had been an unwarrantable lack of diligence on the part of the Mexican authorities in prosecuting the culprits. The Commission found that the authorities had inspected the scene of the killing on the night it had occurred ; interrogated witnesses the following day ; and taken a number of suspected persons into custody, although it had eventually released them owing to lack of sufficient evidence. The Commission held that, although a more efficient course of procedure might have been followed, the record did not present such a lack of diligence as to constitute an international delinquency (p. 61). The Commission declared that the propriety of governmental acts should be put to the test of international standards and, to constitute an international delinquency, the treatment of an alien " ... should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency " (pp. 61-62).

This decision was followed in the *Miller, Eitelman and Eitelman* case, R.I.A.A., Vol. IV, p. 336. See also the *Mecham* case, R.I.A.A., Vol. IV, p. 440, where the Commission held that : " even though more efficacious measures might perhaps have been employed to apprehend the murderers of Mecham, that is not the question but rather whether what was done shows such a degree of negligence, defective administration of

justice, or bad faith, that the procedure falls below the standards of international law " (p. 443).

Putman Case (1927)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 151

102. A Mexican policeman who killed Putman was sentenced to death by a lower court on grounds of homicide; perpetrated without provocation, and treachery. The sentence was commuted by a higher court to eight years' imprisonment. It was held that Mexico was not responsible for a denial of justice by reason of the lesser penalty imposed by the higher court (pp. 153-154). The Commission held that Mexico was liable for the release of the policeman by a local military commander before the expiry of the sentence, since it could not be said that in these circumstances Mexico had entirely fulfilled its duty to punish the murderer (p. 154).

103. See also the *Denham* case, R.I.A.A., Vol. VI, p. 312, where the Panama-United States General Claims Commission held that the reduction of an originally adequate sentence as a result of an amnesty gave rise to international liability on the part of Panama.

Cf. the *Wenzel* case, R.I.A.A., Vol. X, p. 428, where the German-Venezuelan Mixed Claims Commission held that the release of a revolutionary leader by the Chief Executive of Venezuela, acting in excess of his powers, did not render Venezuela liable for the damage caused to German property during an uprising led by the revolutionary leader.

III. State responsibility in respect of acts of private persons, including those engaged in revolutions or civil wars

Aroa Mines Case (1903)

United Kingdom, Venezuela

United Kingdom-Venezuela Mixed Claims Commission: Umpire: Plumley (United States of America); Harrison (United Kingdom); Grisanti (Venezuela)

Reports of International Arbitral Awards, Vol. IX, p. 402

104. After an exhaustive survey of the authorities the Umpire determined that the Government of Venezuela was not responsible for any injury suffered by British subjects in the course of an unsuccessful insurrection or civil war unless fault or want of due diligence on the part of the Venezuelan authorities could be proved (pp. 439-445).

French Company of Venezuela Railroads Case (1902)

France, Venezuela

France-Venezuela Mixed Claims Commission: Umpire: Plumley (United States of America); Rocca (France); Paul (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 285

105. The Umpire declared that the Venezuelan Government could not be held liable for the dislocation of trade and the loss of business caused to the Company as a result of a revolutionary uprising, in particular since the Company must have envisaged this possibility when it decided to undertake operations in the country. Nevertheless, the revolution having been successful, the Government was held responsible "for all the necessary, natural, and consequential injuries which resulted to the railroad and its properties when used by either the revolutionary or the governmental forces " (p. 354).

See also the *Dix* case, R.I.A.A., Vol. IX, p. 119; para. 175 *infra.*

Home Frontier and Foreign Missionary Society Case (1920)

United Kingdom, United States

United Kingdom-United States Arbitral Tribunal: President: Fromageot (France); Fitzpatrick (United Kingdom); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 42

106. The United States presented this claim in respect of the loss suffered by the Home Frontier and Foreign Missionary Society during a rebellion in 1898 in the then British Protectorate of Sierra Leone. It was alleged that the rebellion followed the imposition of a "hut tax" and that the British Government, knowing that the tax was resented, should have taken more adequate measures to maintain law and order. The Tribunal held that Great Britain was not liable. The Tribunal declared:

> "It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection " (p. 44).

Reference was also made to the fact that the Missionary Society must have been aware of the dangers of their mission.

Home Insurance Company Case (1926)

Mexico, United States

Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Macgregor (Mexico); Parker (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 48

107. The United States presented a claim on behalf of the Home Insurance Company which had paid money under two insurance policies in order to indemnify another United States company against loss caused by "confiscation, detention or sequestration by the constituted authorities for the time being, whether local or federal". The property concerned had been seized by revolutionary forces whilst being transported on the Government railway. The Commission held that the

liability of the Government when acting as a carrier was no greater than that of a private concern, and that it had acted without negligence (p. 51). As regards the duty of the Government to protect the persons and property within its jurisdiction, the Commission found that there had been no failure in this respect in view of the suddenness and extent of the revolt (p. 52). The claim was therefore dismissed.

108. *Cf.* the *Eagle Star and British Dominion Insurance Company* case, R.I.A.A., Vol. V, p. 139, where the Mexico-United Kingdom Claims Commission held that it had no jurisdiction to consider a claim submitted on behalf of British insurance companies for an amount paid to a Mexican company which had suffered loss owing to the acts of revolutionary forces. Insurers were to be distinguished from other claimants in that they undertook, on a professional basis, to run the risks involved (pp. 141-142).

Kummerow, Redler and Co., Fulda, Fischbach, and Friedericky Cases (1903)

Germany, Venezuela

Germany-Venezuela Mixed Claims Commission : Umpire : Duffield (United States of America); Goetsch (Germany); Zuloaga (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 369

109. In giving his opinion on these cases the Umpire stated that, under general principles of international law, Venezuela was not liable for injuries to German nationals or their property caused during a civil war since, from its outset, the war had been beyond the power of the Government to control (p. 400). Venezuela had, however, accepted liability under an agreement between the two countries for injuries or wrongful seizures of property by members of the revolutionary forces.

Mexico City Bombardment Claims (1930)

Mexico, United Kingdom

Mexico-United Kingdom Claims Commission : President : Zimmerman (Netherlands); Flores (Mexico); Percival (United Kingdom)

Reports of International Arbitral Awards, Vol. V, p. 76

110. Mexican revolutionary forces occupied the hostel of the Young Men's Christian Association in Mexico City and forced the claimants to leave. Upon their return the claimants found that their personal property had been destroyed or looted. The Commission held that, under the terms of the convention establishing the Commission, Mexico was liable ; the occupying and looting of the building must have been known to the authorities but no evidence had been produced showing that any suppressive measures had been adopted (pp. 79-80).

The reasoning in the above decision was followed in the *Gill* case, R.I.A.A., Vol. V, p. 157 at pp. 159-160.

Noyes Case (1933)

Panama, United States

Panama-United States General Claims Commission : President : van Heeckeren (Netherlands); Alfaro (Panama); Root (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 308

111. Whilst driving through a village near Panama City, Noyes was attacked and wounded by a crowd which had gathered to attend a political meeting. A policeman protected him at the time of the assault, but Noyes was attacked again shortly after he had continued on his journey ; he was then rescued by the Commander of the Panama City police. The United States contended that Panama was liable since the authorities had not taken the precaution of increasing the police force at the village although it had been known in advance that the meeting would take place there.

112. The Commission held that no liability arose under international law merely by reason of the fact that an alien had been injured by private persons and the injury could have been prevented by the presence of a sufficient police force.

> "There must be shown special circumstances from which the responsibility of the authorities arises ; either their behavior in connection with particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals " (p. 311).

In the absence of any such circumstances the Commission held Panama not liable.

Georges Pinson Case (1928)

France, Mexico

French-Mexican Claims Commission : President : Verzijl (Netherlands); Ayguesparsse (France); Roa (Mexico)

Reports of International Arbitral Awards, Vol. V, p. 327

113. The Convention establishing the terms of reference of the Commission provided that claims were to be settled on an equitable basis. Thus questions as to the scope of State responsibility under international law only arose incidentally, for example in connexion with the contention of the Mexican Government that the Convention should be strictly construed since both the Convention and international law rejected the principle of State responsibility for damage caused to aliens in the course of revolutions or uprisings, or of their suppression. The President of the Commission declared that, although he was prepared to agree that positive international law did not yet recognize a general obligation that States should compensate aliens for losses suffered in the course of riots or civil wars, nevertheless there were many instances in which States were bound to provide compensation. In addition to the Government's own wrongful acts, it was liable for the acts of its forces in excess of military necessity, acts of

pillage, and for failure to take adequate steps to suppress mutinies or riots (pp. 352-354). As regards the juridical acts or international delinquencies of revolutionaries, the State could only be held responsible if the revolutionaries were successful in gaining supreme power, when responsibility became retroactive to the date when the revolution broke out (pp. 419-433, esp. pp. 426-431).

Sambiaggio Case (1903)

Italy, Venezuela

Italy-Venezuela Mixed Claims Commission: Umpire: Ralston (United States of America); Agnoli (Italy); Zuloga (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 499

114. An Italian claim for property taken by revolutionists failed on the ground that the Venezuelan Government could not be held responsible for those who had escaped its restraint. The Umpire stated that:

> "The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it."

Since there was no evidence that the Government had failed to use its constituted authority promptly and with appropriate force, the Government was not liable for the acts of those seeking to overthrow it (pp. 512-513).

Spanish Zone of Morocco Claims (1925)

Spain, United Kingdom

Rapporteur: Huber (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 615

115. Dealing with the question of responsibility for civil disturbances, revolts and wars, the Rapporteur declared:

> *"Il paraît incontestable que l'Etat n'est pas responsable pour le fait d'une émeute, révolte, guerre civile ou guerre internationale, ni pour le fait que ces événements provoquent des dommages sur son territoire. Il se peut qu'il fût plus ou moins possible de faire la preuve d'erreurs commises par le gouvernement, mais faute de clauses spécifiques d'un traité ou accord, l'investigation nécessaire à cette fin n'est pas admise. Ces événements doivent être considérés comme des cas de force majeure"* (p. 642).

Nevertheless, the fact that the State was not responsible for causing the event did not exclude the duty to act with a certain degree of vigilance. The principle of non-intervention was posited on the maintenance of internal peace and social order in the territorial State. Thus, if a State was not responsible for the revolutionary acts themselves, *" il peut être néanmoins responsable de ce que les autorités font ou ne font pas, pour parer, dans la mesure possible, aux suites"* (*ibid*); see also pp. 656-659.

IV. Responsibility of Federal States and States representing others in international relations

Cayuga Indians Case (1926)

United Kingdom, United States

United Kingdom-United States Arbitral Tribunal: President: Nerincx (Belgium); Fitzpatrick (United Kingdom); Pound (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 173

116. Great Britain presented a claim on behalf of the Cayuga Indians living in Canada who failed to receive an annuity from the State of New York due under contracts entered into in 1789, 1790 and 1795 in respect of the cession of lands in that state, although payments continued to be made to the Cayuga Indians who remained in the United States. It was held that since the agreement concluded in 1795 was not a Federal treaty and did not involve a matter of Federal concern, the United States was not responsible for the failure of the State of New York to make payment (pp. 186-188). The Tribunal found, however, that a claim might lie against the United States under the Treaty of Ghent. See para. 120 *infra*.

In the *De Galván* case, R.I.A.A., Vol. IV, p. 273 the United States was held liable for the failure of Texas courts to prosecute the murderer of a Mexican subject. See para. 57 *supra*.

Pellat Case (1929)

France, Mexico

French-Mexican Claims Commission: President: Verzijl (Netherlands); Ayguesparsse (France); Roa (Mexico)

Reports of International Arbitral Awards, Vol. V, p. 534

117. The Federal Government of Mexico was held liable for the acts of a member State which caused damage to a French claimant, despite the fact that the Central Government lacked power under the Constitution to control the acts of member States or to demand that their conduct should be in uniformity with international law (p. 536).

Spanish Zone of Morocco Claims (1925)

Spain, United Kingdom

Rapporteur: Huber (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 615

118. The Rapporteur held that, since Spain represented the Spanish Zone of Morocco in international relations, to the exclusion of any other sovereign body, the responsibility of Morocco was merged with that of Spain, which alone was responsible at international law (pp. 647-649).

Cf. the *Robert E. Brown* case, R.I.A.A., Vol. VI, p. 120 at pp. 129-130, where Great Britain was held not liable for the acts of the South African Republic committed during the period of British suzerainty. See paras. 32-33 *supra*.

V. Exhaustion of local remedies and determination of the *Tempus Commissi Delicti*

Aguilar-Amory and Royal Bank of Canada Claims (1923)

Costa Rica, United Kingdom

Arbitrator: Taft (United States of America)

Reports of International Arbitral Awards, Vol. I, p. 369

119. A British company and the Royal Bank of Canada entered into contracts with the Government of Costa Rica at a period when power was held by President Tinoco. The Arbitrator held that the two companies were not obliged to proceed with whatever remedies were available to them before the Costa Rican courts after a subsequent Government passed a law nullifying the acts of President Tinoco (pp. 384-387).

Cayuga Indians Case (1929)

United Kingdom, United States

United Kingdom-United States Arbitral Tribunal: President: Nerincx (Belgium); Fitzpatrick (United Kingdom); Pound (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 173

120. The British Government presented a claim on behalf of the Cayuga Indians living in Canada who had failed to receive after 1810 certain payments due to them from the State of New York. The Tribunal found that a claim lay under the Treaty of Ghent, in which the United States had covenanted that the Indians should be restored to the position which they had occupied before the War of 1812. However, no claim accrued against the United States under international law until the State of New York had definitely refused the claim of the Cayuga Indians living in Canada and the United States Government had failed to take steps to carry out its treaty obligations after the matter had been brought to its attention (p. 188).

Central Rhodope Forests Case (Merits) (1933)

Bulgaria, Greece

Arbitrator: Undén (Sweden)

Reports of International Arbitral Awards, Vol. III, p. 1405

121. Greece presented a number of claims on behalf of persons, asserting themselves to be Greek subjects, whose property and contractual rights in forests situated in Central Rhodope were alleged to have been disregarded by Bulgaria in violation of the Treaty of Neuilly. It was contended by Bulgaria that the claimants had not exhausted local remedies. The Arbitrator held that the examination made by the Bulgarian administrative authorities of the titles of the claimants was insufficient to annul the titles and contracts concerned, since the Treaty of Constantinople, transferring the territory concerned from Turkey to Bulgaria, created a presumption in favour of such rights unless there was legal proof to the contrary. This presumption necessarily restricted the application of the local remedies rule. He added:

> *"En outre, la règle de l'épuisement des recours locaux ne s'applique pas, en général, lorsque le fait incriminé consiste en des mesures prises par le Gouvernement ou par un membre du Gouvernement, dans l'exercice de ses fonctions officielles. Il est rare qu'il existe des remèdes locaux contre les actes des organes les plus autorisés de l'Etat"* (p. 1420).

The Arbitrator concluded that the claimants had been justified in considering that any action before the courts against the action taken by the Bulgarian authorities with respect to their rights and titles would be useless (pp. 1418-1420). On the question of restitution of the property concerned and the award of damages, see para 171 *infra.*

122. In the *Robert E. Brown* case, R.I.A.A., Vol. VI, p. 120 at pp. 128-129, the Tribunal held that Brown's claim was not defeated by a failure to exhaust local remedies in view of the various steps taken by the South African authorities, including the removal of the Chief Justice, to defeat his claim. See paras. 32-33 *supra.*

The Electricity Company of Sofia and Bulgaria Case (Preliminary Objection) (1939)

Belgium v. Bulgaria

Permanent Court of International Justice, Series A/B No. 77

123. Belgium claimed that Bulgaria had acted in breach of her international obligations by reason of certain measures which had been taken affecting the rights of the Electricity Company of Sofia and Bulgaria, a Belgian Company. The Company had been taken over by the Municipality of Sofia during the 1914-1918 War. Under the Treaty of Neuilly, Bulgaria was obliged to restore the Company to its owners and to pay an indemnity assessed by a Mixed Arbitral Tribunal; the Treaty also provided for the adaptation of the Company's concession to the change in economic conditions. In 1925, the Belgo-Bulgarian Mixed Arbitral Tribunal assessed the amount of the indemnity, after taking into account the new economic situation. A dispute arose, however, as to the application of the formula to be adopted by the Company for the calculation of the selling price of electricity. The Sofia Municipality brought a successful action against the Company before the Regional Court of Sofia in 1936; this was followed by an appeal to the Sofia Court of Appeal. A further appeal was made by the Company from the decision of the latter Court to the Court of Cassation.

124. At this juncture the case was taken up by the Belgian Government which alleged, *inter alia,* that the judgement of the Court of Appeal disregarded the rights of the Company as established by the Mixed Arbitral Tribunal and entitled the Belgian Government to bring the case before the Permanent Court under the terms of a Treaty of conciliation, arbitration and judicial settlement entered into between Belgium and Bulgaria in 1931 and by virtue of the declarations which both Governments had made, accepting the compulsory jurisdiction of the Court. The major part of the Court's judgement was therefore devoted to

determining the precise implication of these instruments to the facts of the case. The Court found that, under the 1931 Treaty, application might only be made to it after the competent local authority had given a decision with final effect, and that the decision of the Court of Appeal could not be so characterized (pp. 79-80). The Court also examined (pp. 81-83) the argument of the Bulgarian Government that, although the dispute had arisen in 1937 and the acceptance of the Permanent Court's jurisdiction dated from 1926, the situation giving rise to the dispute, in particular the decisions of the Mixed Arbitral Tribunal, dated back to a period before 1926 and that the Court therefore lacked jurisdiction owing to a limitation *ratione temporis* contained in the Belgian declaration. The Court dismissed this argument, however, on the grounds that, although the Tribunal's decisions had been the source of the rights claimed by the Company, they had not been the source of the dispute as such. The Court considered that:

> "It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute " (p. 82).

Upon the facts of the case, the Court found that the central point of the complaints made by the Belgian Government related to events subsequent to 1926. The Court therefore upheld the objection of the Bulgarian Government as regards part of the submission and overruled it as to the remainder.

Claim of Finnish Shipowners against Great Britain in respect of the use of certain Finnish Vessels during the War (1934)

Finland, United Kingdom

Arbitrator: Bagge (Sweden)

Reports of International Arbitral Awards, Vol. III, p. 1479

125. A number of Finnish ships were seized in July 1916 and March 1917 whilst in British ports and were used by British authorities for the remainder of the war. At that time Finland formed part of Russia and the requisition was carried out under an agreement between Russia and Great Britain. After the war, the Finnish shipowners submitted a claim in respect of the hire of the vessels and the loss of three which had been sunk. The British Government maintained that the Russian Government was responsible for the requisition and for any compensation to be paid to the shipowners. The shipowners brought an action against the Crown before an Admiralty Board, from whose decisions there was no appeal except on points of law. The Board found that the requisition had been carried out by Russia and not by Great Britain. The shipowners did not appeal from this decision and the Finnish Government raised the matter before the League of Nations. The parties agreed, upon the recommendation of the League, to submit to arbitration the preliminary question of whether the Finnish shipowners had exhausted the local remedies available to them under English law.

126. The principal question before the Arbitrator was whether the right of appeal from the Admiralty Board constituted an effective remedy which the shipowners were obliged to exhaust. In order to determine this question the Arbitrator had to consider a number of preliminary points relating to the method of determination to be adopted (pp. 1497-1505). The Arbitrator distinguished, on the one hand, the case of an alleged failure of municipal courts to fulfil the requirements of international law, and, on the other, the case of an alleged initial breach of international law, in the present instance, the alleged taking and using of the Finnish ships by the British Government without paying for them. The Arbitrator pointed out that the parties were in agreement that a breach of international law may occur by reason of the very acts complained of and before any recourse has been had to municipal tribunals. "These acts", he stated, "must be committed by the respondent Government or its officials, since it has no direct responsibility under international law for the acts of private individuals " (p. 1501). Since the Finnish Government claimed that its case arose directly from the acts of the British Government, the Arbitrator held that the rule of the exhaustion of local remedies had reference only to the contentions of fact and propositions of law which the claimant State put forward in international procedures (p. 1503). The Arbitrator considered that the proposition advanced at the Codification Conference of 1930, that State responsibility does not come into existence until the private claim has been rejected by the local courts, whilst making recourse a matter of substance and not of procedure, did not affect the immediate question before him. In considering whether there was an effective local remedy, he held that the claim must be regarded as though the various contentions of fact put forward by the claimant were true and the legal arguments correct (pp. 1503-1504). The Arbitrator found that the appealable points of law which existed in relation to the Admiralty Board's decision would have been insufficient to reverse that decision (pp. 1535-1543) and that no other municipal remedies were in fact available to the shipowners (pp. 1535-1550). Accordingly, the Finnish shipowners had exhausted the municipal remedies available to them.

Interhandel Case (Preliminary Objections) (1959)

Switzerland v. United States

International Court of Justice Reports, 1959, p. 6

127. Acting under war legislation, in 1942 the United States seized the assets of the Interhandel company as being German enemy property. The Swiss Government contested this action on the ground that the company was Swiss and claimed that the United States was under an obligation to restore the assets or, alternatively, to submit the dispute to arbitration or to a conciliation procedure.

128. The United States presented a number of objections to the Court's exercise of jurisdiction. The third of these objections was that the company had not exhausted the local remedies available to it in the United States courts. In considering this objection (pp. 26-29) the Court found that a suit brought by

Interhandel was in fact still pending in the United States courts. More generally, the Court observed that the rule requiring local remedies to be exhausted before international proceedings may be instituted was a " well established rule of customary international law " (p. 27) designed to provide the State concerned with an opportunity to redress the violation by its own means, within the framework of its own domestic legal system. The Swiss Government, whilst not challenging the rule itself, contended, however, that the present case was governed by an exception to the rule in that United States representatives had admitted on several occasions that Interhandel had exhausted the available local remedies. The Court set aside this assertion since these opinions had been based on a view which had subsequently proved unfounded. The Swiss Government further argued that the rule was not applicable because the measure taken against Interhandel had been taken, not by a subordinate authority, but by the Government of the United States itself. The Court rejected this contention in view of the fact that the United States legislation in question provided adequate remedies to enable interested persons to defend their rights against the Executive. The Court also dismissed an argument put forward by the Swiss Government that the United States courts were not in a position to adjudicate in accordance with the rules of international law. The Court found that United States courts were competent to apply international law in their decisions when necessary, but that the proceedings had not reached the stage of adjudication of the merits in which considerations of international law became pertinent. The Court did not consider it necessary to determine the question of the effect before United States courts of Executive Agreements, or the basis which those courts might adopt for their final decision.

129. Lastly, the Swiss Government claimed that a decision given by the Swiss Authority of Review and based on an international instrument known as the Washington Accord, was an international judicial decision which the United States had declined to execute. The Swiss Government argued that: "When an international decision has not been executed, there are no local remedies to exhaust, for the inquiry has been caused directly to the injured State " (p. 28). The Swiss Government thus contended that the failure by the United States to implement the decision constituted a direct breach of international law, causing immediate injury to the rights of Switzerland. The Court found, however, that the operative part of the decision of the Swiss Authority of Review related to the unblocking of the assets of Interhandel in Switzerland; it had no bearing on the present claim which involved the restitution of the assets in the United States. The Court therefore upheld the United States objection to jurisdiction based on the non-exhaustion of local remedies.

130. As regards the alternative claim of the Swiss Government, that the Court should declare that the United States was under an obligation to submit the dispute to arbitration or conciliation, the Court held that ". . . the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission " (p. 29). The Court accordingly upheld the United States objection in respect of the alternative claim also.

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, pp. 92-93

Claim No. 3

131. This was one of a complex group of claims arising out of a lighthouse concession contract entered into between the French firm Collas et Michel and the Ottoman Government in 1913. Claim No. 3 related to the non-payment by Greece of a retroactive increase in lighthouse dues, payable in respect of ships which had been requisitioned by Greece and which used the port of Constantinople in 1919. Greece paid the original amount of the dues on 14 December 1921. On 7 January 1922, however, the Allied High Commissioners in Constantinople tripled the tariff with retroactive effect to 17 May 1919. Greece claimed that the payment made in December 1921 had extinguished the debt, as in private law, and that article 137 of the Treaty of Lausanne maintaining certain decisions of the Allied High Commissioners did not apply to the decision in question.

132. The Tribunal held that article 137 of the Treaty of Lausanne covered the decision of the Allied High Commissioners, notwithstanding the earlier payment by Greece, and there were no grounds for giving the provision a restrictive interpretation. In the opinion of the Tribunal, the argument drawn from private law could not prevail in view of the express provision in the Treaty of Lausanne. The claim on behalf of the French firm was accordingly admitted.

S.S. Lisman. *Disposal of Pecuniary Claims Arising Out of the Recent War (1914-1918), (1937)*

United Kingdom, United States

Arbitrator: Hutcheson (United States of America)

Reports of International Arbitral Awards, Vol. III, p. 1767

133. The United States and the United Kingdom agreed in 1927 not to present against each other any claims arising out of damage suffered or supplies or services furnished during the 1914-1918 War. The United States agreed to satisfy any claims of its nationals which it regarded as meritorious where the claimant had already exhausted the legal remedies available to him in British courts. It was claimed on behalf of Interoceanic Transportation Company that the Company had suffered loss as a result of the detention of one of its ships, the *S.S. Lisman,* in a British port. The Company had brought an unsuccessful action before

the British Prize Court. The United States argued that the present case could not be entertained since the Company had not appealed against the Prize Court's decision. The Arbitrator held that although this acted as a *prima facie* bar, it was open to the claimant to show that no useful object would have been served in making an appeal (pp. 1773-1774). With regard to the claimant's argument that a denial of justice had occurred by reason of the Prize Court's finding that the British Government had not been at fault since there had been no undue delay in the return of the vessel, the Arbitrator declared that this argument could only succeed in the absence of any credible evidence to support the decision of the Prize Court. The Arbitrator found that, on the facts, the decision of the Prize Court was a just and reasonable one (pp. 1792-1793).

See also *S.S. Segurança* case, R.I.A.A., Vol. III, p. 1801, for a similar claim.

Mariposa Development Company Case (1933)

Panama, United States

Panama-United States General Claims Commission: President: van Heeckeren (Netherlands); Alfaro (Panama); Root (United States of America)

Reports of International Arbitral Awards, Vol. VI, p. 339

134. On 27 December 1928 a law was enacted by the legislature of Panama allowing private persons to sue for the recovery, on behalf of the State, of public properties in the hands of private persons who had acquired them illegally. In May 1929 a Panamanian citizen brought an action before a First Circuit Judge to recover an estate which had been purchased by the Mariposa Development Company, an American firm. The validity of the Company's title was upheld in a judgement given on 3 October 1930. This decision was reversed on 20 October 1931 when the Supreme Court declared the land was national property and ordered that the Company's title should be cancelled. The United States presented a claim for expropriation. The Commission held that it had no jurisdiction to consider claims arising after 3 October 1931, the date of the exchange of ratifications of the Claims Convention between the United States and Panama. The major point at issue therefore concerned the date when the claim arose. The Commission determined that it was not until after the Supreme Court's opinion that the title of the Mariposa Development was interfered with, so as to give rise to an international claim. In the opinion of the Commission, the mere enactment of legislation by which property might be expropriated without compensation should not normally create at once an international claim. "There should be a *locus penitentiae* for diplomatic representation and executive forbearance" (p. 341). Accordingly, the Commission held that no damage to sustain a claim had arisen before the decision of the Supreme Court on 20 October 1931 and in consequence the Commission lacked jurisdiction to consider the matter (pp. 340-341).

Mexican Union Railway Case (1930)

Mexico, United Kingdom

Mexico-United Kingdom Claims Commission: President: Zimmerman (Netherlands); Flores (Mexico); Percival (United Kingdom)

Reports of International Arbitral Awards, Vol. V, p. 115

135. The Mexican Union Railway, a British company, entered into a concessionary contract with the Mexican Government whereby it agreed to be treated as a Mexican company, to submit to the jurisdiction of Mexican courts, and not to request diplomatic intervention. Following the decision in the *North American Dredger Company* case, R.I.A.A., Vol. IV, p. 26, the Commission held that it lacked jurisdiction. The Commission distinguished, however, between submission to the Mexican courts and the right to apply for diplomatic intervention. An application might be made to the claimant's Government in the event that denial or undue delay of justice resulted from an appeal to the local courts. The company had neglected to place its case before the Mexican courts, however, so that no international delinquency had been shown to have been caused (pp. 120-122). The Commission declared that: "It is one of the recognized rules of international law that the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question" (p. 122).

136. See also *MacNeill* case, R.I.A.A., Vol. V, p. 135, where the Commission held that it had jurisdiction and distinguished the *Mexican Union Railway* case on the grounds that the contract in question was with a local authority, not with the Government itself, and the Calvo clause drafted in such a way that it was uncertain what rights had been waived by the concessionnaire. *The Mexican Union Railway* case was followed in the *Interoceanic Railway of Mexico* case, R.I.A.A., Vol. V, p. 178.

The Panevezys-Saldutiskis Railway Case (Preliminary Objections) (1939)

Esthonia v. Lithuania

Permanent Court of International Justice, Series A/B No. 76

137. This case was brought by Esthonia on the ground that Lithuania had refused to recognize the rights of an Esthonian company, as the successor of a pre-1917 Russian company, to the Panevezys-Saldutiskis railway, which had been seized and operated by the Lithuanian Government. Lithuania raised two objections to the Court's jurisdiction: firstly, that Esthonia was unable to satisfy the rule of the nationality of claims, namely, that the claim must be held by a national both at the time of presentation and when the injury was suffered; and, secondly, that local remedies available before the Lithuanian courts had not been exhausted. Lithuania also submitted a counterclaim. The Court held that, on the facts of the case, it could not give a ruling on the first objection without passing on the merits of the case as a whole, and therefore declined to admit the objection. Regarding the second objection put forward by the Lithuanian Government, the Court

agreed in principle with the counter arguments of the Esthonian Government, namely that there are exceptions to the rule of international law requiring the exhaustion of local remedies in the case where municipal courts lack jurisdiction to grant relief, or if resort to those courts would produce a repetition of a decision already given. However, the Court found that these two admitted exceptions did not in fact apply in respect of the claim of the Esthonian company and that the local remedies available in Lithuanian courts had not been exhausted. The Court therefore upheld the Lithuanian objection and did not consider the merits of the case. (pp. 18-21).

Phosphates in Morocco (Preliminary Objections) (1938)

Italy v. France

Permanent Court of International Justice, Series A/B No. 74

138. The French authorities in Morocco adopted a number of measures which, in the opinion of the Italian Government, amounted to monopolization of the phosphates industry in violation of the international obligations imposed on Morocco. The various measures taken included the dispossession of the phosphates interests held by an Italian national in 1925 as a result of a decision of the Mines Department, a branch of the French administration. The French Government's acceptance of the compulsory jurisdiction of the Permanent Court only became effective, however, in 1931. The Italian Government argued that the 1925 decision and the policy of monopolization formed part of a continuing and progressive unlawful action which was only completed by certain acts subsequent to the critical date when France's acceptance of jurisdiction became effective. The Court did not accept this argument and did not therefore proceed to consider the merits of the case or to examine the grounds upon which the Italian Government relied in claiming that a denial of justice had followed the Mine Department's decision. The Court did, however, state that, if the Italian allegation that the 1925 decision was an unlawful international act was accepted, then that decision would constitute "a definitive act which would, by itself, directly involve international responsibility". (p. 28). The Court continued, "This act being attributable to the State and described as contrary to the treaty rights of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it." (*ibid.*).

Selwyn Case (1903)

United Kingdom, Venezuela

United Kingdom-Venezuela Mixed Claims Commission: Umpire: Plumley (United States of America); Harrison (United Kingdom); Grisanti (Venezuela).

Reports of International Arbitral Awards, Vol. IX, p. 380.

139. Venezuela objected to the jurisdiction of the Commission on the ground that a suit was pending before the Venezuelan courts based on the same right of action. The Umpire declared:

> "International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgement has been pronounced by such court, to disregard the same so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof as in the given case justice may require." (p. 381)

Spanish Zone of Morocco Claims (1925)

Spain, United Kingdom

Rapporteur: Huber (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 615

Claim No. 53 Ziat Ben Kiran Case (pp. 729-732)

140. Great Britain presented this claim on behalf of a British protected person for damage caused during a riot. The claimant had notified the local commander of his losses and the British embassy in Madrid had also transmitted his claim to the Spanish Government. It was held that the claim based on an alleged denial of justice must fail since the available local remedies had not been exhausted.

VI. Circumstances in which an act is not wrongful

(A) General

Boffolo Case (1903)

Italy, Venezuela

Italy-Venezuela Mixed Claims Commission: Umpire: Ralston (United States of America); Agnoli (Italy); Zuloaga (Venezuela).

Reports of International Arbitral Awards, Vol. X, p. 528.

141. The Italian Government presented a claim on behalf of Boffolo who had been summarily expelled from Venezuela. The Umpire held that, although a State possesses a general right of expulsion, it may only exercise it in extreme instances and in a manner least injurious to the person concerned; in the event that the country concerned fails to state the reason for the expulsion before an international tribunal it must accept the consequences. The Umpire found that the only reasons given for the expulsion were contrary to the Venezuelan Constitution and could not be accepted as sufficient. Damages were awarded accordingly (pp. 534-537).

For similar decisions see the *Maal* case, RIAA, Vol. X, p. 730, *Oliva* case, RIAA, Vol. X, p. 600 and *Paquet* case, RIAA, Vol. IX, p. 323.

Company General of the Orinoco Case (1902)

France, Venezuela

France-Venezuela Mixed Claims Commission: Umpire: Plumley (United States of America); Rocca (France); Paul (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 184

142. The Company held two concessionary contracts for the exploitation of minerals and the development of transport facilities in a large region of Venezuela. The Venezuelan Government rescinded the contracts and refused to give effect to an assignment which the Company had made in exercise of its rights under the contracts. It was held that although Venezuela was entitled to abrogate the contracts, which were the cause of bad relations with a neighbouring State, the Company was entitled to compensation in respect of the failure of the assignment.

> "As to the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefore the duty of compensation." (p. 280. See generally pp. 279-282).

143. See also the *Great Venezuelan Railroad* case, RIAA, Vol. X, p. 468, at p. 471, where the German-Venezuelan Mixed Claims Commission held that an agreement in which the Venezuelan Government had undertaken to indemnify the Railroad for any damage suffered whilst carrying troops or munitions during efforts to put down a revolution was absolutely void as being contrary to public policy, which required that the safety of the State be preserved at all costs.

The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (1926)

United States, Reparation Commission: Arbitrators: Sjoeborg (Sweden); Lyon (France); Bayne (United States of America).

Reports of International Arbitral Awards, Vol. II, p. 777.

144. The Standard Oil Company, a United States corporation, claimed the beneficial ownership of certain oil tankers which Germany had handed over to the Reparations Commission in 1919. The arbitration agreement provided that if the Standard Oil Company failed to establish beneficial ownership it might nevertheless receive reimbursement through the transfer to it of tankers of equal value. The Company's claim to compensation was dismissed on the ground that the German Government had not discriminated between the Deutsche Amerikanische Petroleum Gesellschaft (which was a German corporation, owned by the Standard Oil Company) and non-German shipping companies as regards payment of compensation. Since any person taking up residence or investing capital in a foreign country must submit, under reservation of any discrimination against him as a foreigner, to the laws of that country, the Standard Oil Company had no justification for claiming compensation (pp. 793-795).

145. Cf. the statement of the Permanent Court of International Justice, in the course of giving judgement in the *Peter Pázmány* case: "... a measure prohibited by an international agreement cannot become lawful under that instrument simply by reason of the fact that the State concerned also applies the measure to its own nationals." (p. 243). Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal [*The Peter Pázmány University v. the State of Czechoslovakia (1933)*], *P.C.I.J., Series A/B No. 61.*

In the matter of the Death of James Pugh (1933)

Panama, United Kingdom

Arbitrator: Lenihan (United States of America)

Reports of International Arbitral Awards, Vol. III, p. 1439

146. James Pugh, a national of the Irish Free State, died as a result of injuries received whilst resisting arrest in Panama. The Arbitrator held that the Panamanian Government was not responsible. Pugh's death was the result of his own fault in resisting arrest; the police had not acted in excess of their powers. (pp. 1447-1451).

See also the *Massey* case, RIAA, Vol. IV, p. 155, where a contention that the claimant's own misconduct had contributed to his death was rejected; para. 100 *supra.* In the *Kling* case, RIAA, Vol. IV, p. 575, however, damages were reduced in view of the imprudent behaviour of Kling and his companions. See para. 71, *supra.*

Case concerning the payment of various Serbian Loans issued in France (1929).

Case concerning the payment in gold of the Brazilian Federal Loans issued in France (1929)

France v. Brazil

France v. Serb-Croat-Slovene State

Permanent Court of International Justice, Series A Nos. 20/21

147. The dispute submitted to the Court in these two cases related to the alleged failure of the Serbian and Brazilian Governments to service the obligations which they assumed in respect of the French bond holders of certain loans. In the course of its judgement the Court rejected the argument that the First World War, and the economic dislocation which ensued, constituted a defence of *force majeure,* releasing the debtor State from the legal obligations. The Court also rejected the argument of impossibility of performance because of the inability to obtain gold coins *in specie,* on the ground that the promise was to be regarded as one for the payment of gold value. (pp. 39-40; p. 120).

148. In the *Russian Indemnity* case, RIAA, Vol. XI, p. 421 at p. 443, the Permanent Court of Arbitration rejected the contention of the Ottoman Government that *force majeure,* in the form of financial difficulties, had prevented prompt settlement of the payments due, on the ground that the sums in question could not be

said to have imperilled the existence of the Ottoman Empire or seriously to have compromised its internal or external situation. On the question of damages, see para. 196 *infra.*

The "Société Commerciale de Belgique" (1939)
Belgium v. Greece
Permanent Court of International Justice, Series A/B No. 78

149. The Société Commerciale de Belgique entered into a contract with the Greek Government in 1925 for the construction of certain railway lines. The work to be undertaken was financed by the Company which lent money to the Government in return for the issue of bonds ; these bonds became part of the Greek public debt. In 1932, as a result of the general financial crisis, the Greek Government defaulted in its service of the debt. An Arbitral Commission, established under the contract, determined that the 1925 contract should be cancelled and awarded the Company 6,721,868 gold dollars, with interest at 5 per cent. The Greek Government refused to pay this sum on the ground that the amount due to the Company should be considered part of the Greek public debt, with interest and mode of settlement being determined accordingly.

150. In 1937, the Belgian Government took up the case. In the course of proceedings before the Permanent Court the Belgian Government dropped its original allegation that the disregard of the arbitral awards by the Greek Government constituted a violation of that Government's international obligations, and sought merely a declaration that the awards were definitive and obligatory. Since the Greek Government expressly acknowledged that the awards had the force of *res judicata,* the Court held that there was no material difference between these two submissions. However, the Greek Government also stated that by reason of its budgetary and monetary situation it was materially impossible for it to execute the awards as formulated. The Court declared that, even if this should be so, it was unable to ask the Company to reach a settlement on the basis of the position adopted vis-à-vis other bondholders of the public debt. The Court also stated that it could not entertain the Greek submission as amounting to a justification that, owing to *force majeure,* it could not execute the awards, having regard to the fact that the question of Greece's capacity to pay was outside the scope of the proceedings before the Court. (pp. 176-178).

Salem Case (1932).
Egypt, United States.
Arbitrators: Simons (Germany); Badawi (Egypt); Nielsen (United States of America).
Reports of International Arbitral Awards, Vol. II, p. 1161.

151. In the course of this case the United States alleged that the Mixed Courts in Egypt had committed a denial of justice. The Tribunal dismissed this argument on the ground that the Egyptian Government lacked power to remedy the faults of those Courts. "The responsibility of a State can only go as far as its sovereignty ; in the same measure as the latter is restricted, that is to say as the State cannot act in a free and independent manner, the liability of the State must also be restricted." (p. 1203).

Toberman, Mackey and Company Case (1927)
Mexico, United States.
Mexico-United States General Claims Commission: President: van Vollenhoven (Netherlands); Mac-Gregor (Mexico); Nielsen (United States of America).
Reports of International Arbitral Awards, Vol. IV, p. 205.

152. The Company claimed that its property had been damaged owing to the negligence of Mexican customs officials and that the Mexican Government was liable under the general principles of law, as well as under the provisions of its own customs regulations. It was held that there was no principle of international law obliging a Government to take special care of merchandise in its customs houses for the mere purpose of exercising the sovereign right of collecting customs duties (p. 206). The parties concerned had failed to comply with Mexican law, and it was their negligence which threw an undue burden of care on the customs authorities. The claim was accordingly dismissed.

(B) War measures

American Electric and Manufacturing Co. Case (1903)
United States, Venezuela
United States-Venezuela Mixed Claims Commission: Umpire: Barge (Netherlands); Bainbridge (United States of America); Paul (Venezuela)
Reports of International Arbitral Awards, Vol. IX, p. 145

153. The American Electric and Manufacturing Co. was held entitled to compensation for the seizure of property by the Venezuelan Government and for the damage which the property suffered in the course of military operations against revolutionaries (p. 146). A claim for damages suffered during a Government bombardment was disallowed as being an "incidental and necessary consequence of a legitimate act of war" (p. 147).

The decision was followed by the France-Venezuela Mixed Claims Commission in the *Petrocelli* case, RIAA, Vol. X, p. 591.

See also the *Luzon Sugar Refining Co.* case, RIAA, Vol. VI, p. 165, where a claim for damage to neutral property inflicted during military operations against insurgents was refused.

Bembelista Case (1903)
Netherlands, Venezuela
Netherlands-Venezuela Mixed Claims Commission: Umpire: Plumley (United States of America); Hellmund (Netherlands), who was succeeded by Möller; Iribarren (Venezuela)

Reports of International Arbitral Awards, Vol. X, p. 717

154. The Umpire denied the claimant's request for compensation on the ground that the damage to his property had been inflicted during the "rightful and successful attempt of the Government to repossess itself of one of its important towns", and constituted "one of the ordinary incidents of battle" (pp. 717-718).

The Carthage Case (1913)

France-Italy

Permanent Court of Arbitration: Renault (France); Kriege (Germany); Fusinato (Italy); de Taube (Russia); Hammarskjöld (Sweden)

Reports of International Arbitral Awards, Vol. XI, p. 449

155. The *Carthage*, a French vessel, was stopped by an Italian naval ship when sailing from Marseilles to Tunis during the Turco-Italian war in Africa in 1912. The *Carthage* had an aeroplane on board which the Italian Government claimed was war contraband, although it was destined for a private consignee. The *Carthage* was detained in an Italian port for some days before being allowed to resume her voyage. The aeroplane, which had been landed at the Italian port, was released at the same time. France presented a claim for the insult to the French flag, for the violation of international law, and for the damage suffered by the private parties interested in the *Carthage* and her voyage. The Italian Government put forward a counter-claim for its expenses in seizing the ship. The Permanent Court of Arbitration held that the general right of belligerents to search neutral ships was limited, as regards subsequent acts, by the presence or absence of contraband or of adequate legal grounds to believe that contraband may exist. In the particular case the fact that the aeroplane was destined for Tunis was found insufficient to establish that it was contraband; accordingly, the capture of the vessel and its detention were illegal (pp. 459-460). For a similar decision see the *Manouba* case, RIAA, Vol. XI, p. 463.

Coleman Case (1928)

Mexico, United States

Mexico-United States General Claims Commission: President: Sindballe (Denmark); MacGregor (Mexico); Nielsen (United States of America)

Reports of International Arbitral Awards, Vol. IV, p. 365

156. After Coleman had been wounded by revolutionary troops, his employees sent a boat to enable him to be moved to a place where he could receive the medical treatment he needed. The Mexican Federal Officer in charge of the locality detained the boat for three days and used it to transport troops and equipment. The seizure of the ship having been made without compensation and without any grounds of imperative military necessity having been shown, Mexico was held liable to pay compensation for the serious consequences of the delay on the claimant's health. (p. 367).

Goldenberg Case (1928)

Germany, Romania

Arbitrator: Fazy (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 901

157. Goods belonging to Goldenberg and Sons, a Romanian Company, were requisitioned in Belgium by German troops before Romania entered the war. In 1921 the German Government paid compensation equal to one-sixth of the purchaseprice. The Arbitrator held that, although a State may derogate from the principle of respect for private rights on grounds of public utility, of which requisition in time of war formed an example, nevertheless the seizure by German troops became illegal after the failure to pay an equitable amount of compensation within a reasonable time (p. 909). Accordingly the requisition constituted an "act contrary to international law", and Germany was liable to compensate the Romanian firm.

158. For a similar decision see *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the War*, RIAA, Vol. II, p. 1035 at p. 1039. *Cf.* the *Bischoff* case, RIAA, Vol. X, p. 420, where the German-Venezuelan Mixed Claims Commission held that the Venezuelan Government was liable for the detention of property for an unreasonable length of time although the original seizure had been justified as a proper exercise of discretion following a smallpox epidemic. In the *Upton* case, RIAA, Vol. IX, p. 234 at p. 236, the Venezuelan Government was held liable for the seizure of Upton's ship for use against revolutionary forces. The United States-Venezuela Mixed Claims Commission declared: "The right of the State, under stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof".

Norwegian Shipowners Claims (1922)

Norway, United States

Arbitrators: Vogt (Norway); Valloton (Switzerland); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. I, p. 307.

159. Whilst upholding the right of the United States as a belligerent to seize neutral property for public needs, the Tribunal found that the contracts placed by the Norwegian claimants had themselves been seized, in addition to the physical properties, and that there had been undue delay in returning the claimant's property or paying compensation after the emergency had ended in 1919. The Tribunal rejected the contention of the United States that, since the seizure had been carried out in consequence of *force majeure* or "restraint of princes", no liability had been incurred. The Tribunal declared that, although "restraint of princes" might be invoked in disputes between private citizens, it could not be invoked in an international claim between Governments.

"International law and justice are based upon the principle of equality between States. No State can

exercise towards the citizens of another civilized State the 'power of eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary." (p. 338)

160. The Tribunal concluded that, whilst in view of the war conditions which had prevailed it could not be said that the discrimination against the claimants had been sufficiently arbitrary as to justify a special claim for damages, nevertheless the United States had made ". . . a discriminating use of the power of eminent domain towards citizens of a foreign nation, and they are liable for the damaging action of their officials and agents towards these citizens of the Kingdom of Norway". (p. 339) The Tribunal awarded compensation to each claimant based on an assessment *ex aequo et bono* of the market value of the shipbuilding contracts, together with a lump sum in respect of interest for five years from 1917. (pp. 339-342) The United States paid the amount awarded but stated that it would not accept the bases of the award as being declaratory of international law or as being binding as a precedent. (pp. 344-346)

Spanish Zone of Morocco Claims (1925)
Spain, United Kingdom
Rapporteur : Huber (Switzerland)
Reports of International Arbitral Awards, Vol. II, p. 615
Claim No. 25. Beru - Madan Rzini Case (pp. 696-697)

161. The Rapporteur held that an indemnity was due in respect of cattle killed by Spanish soldiers in the course of operations against rebellious Moroccan tribes since the killing had not been justified by military necessity.

VII. The duty to make reparation, its forms and extent

Administrative Decision No. III (1923)
Germany, United States
Germany-United States Mixed Claims Commission: Umpire : Parker (United States of America); Kiesselbach (Germany); Anderson (United States of America)
Reports of International Arbitral Awards, Vol. VII, p. 64.

162. In this decision the Commission laid down rules to govern the computation of compensation in respect of claims falling within the Commission's *Administrative Decision No. I,* RIAA, Vol. VII, p. 21, and with respect to the measure of damages for all property taken. The Commission held that there was no basis for awarding damages in the nature of interest where the loss was neither liquidated nor capable of being computed; losses due in respect of personal injuries fell into this class (p. 65). In cases of property losses, however, it was held that interest might be awarded together with damages for the loss. In reliance on its interpretation of the relevant treaty provisions the Commission decided that, in claims for property taken or destroyed during the period of American neutrality, the compensation awarded should consist of the value of the property taken, assessed at the date of taking, plus 5 per cent interest representing the loss suffered by the claimant during the period he was deprived of his property (p. 66). A similar rule was applied in the case of property taken during the period of German belligerency. Interest was awarded from 18 November 1918 in respect of other instances of material damage. In all other cases, interest was awarded as from the date of the Commission's award (p. 70).

Administrative Decision No. V (1924)
Germany, United States
Germany-United States Mixed Claims Commission: Umpire : Parker (United States of America); Kiesselbach (Germany); Anderson United States of America)
Reports of International Arbitral Awards, Vol. VII, p. 119.

163. In the course of this decision regarding the jurisdiction of the Commission as determined by the rule of the nationality of claims, the Umpire declared that:

". . . the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore a national claim which may and should be espoused by the nation injured, must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant . . ." (p. 153).

Case of the Ship Cape Horn Pigeon (1902)
Russia, United States
Arbitrator : Asser (Netherlands)
Reports of International Arbitral Awards, Vol. IX, p. 51.

164. The *Cape Horn Pigeon,* an American whaling ship, was seized by a Russian cruiser when on the high seas. Russia recognized responsibility and the sole issue before the Arbitrator was that of the amount of damages to be awarded. He held that the damages payable should include not only an amount in respect of the damage actually suffered, but also any loss of profits incurred as a result of the seizure (p. 65).

165. For a similar decision see the *Shufeldt* case, RIAA, Vol. II, p. 1079, where the Arbitrator held that the compensation payable should include a sum in respect of future profits. In the *Wimbledon* case, P.C.I.J., Series A, No. 1, at pp. 31-32, the damages awarded by the Permanent Court included the cost of demurrage and of the ship's deviation through the Danish Straits; an application for damages based on the ship's contribution to the charterer's general expenses was refused however. See para. 25 *supra.*

The Carthage Case (1913)

France, Italy

Permanent Court of Arbitration: Renault (France); Kriege (Germany); Fusinato (Italy); de Taube (Russia); Hammarskjöld (Sweden).

Reports of International Arbitral Awards, Vol. IX, p. 449.

166. The Court awarded damages for the damage suffered by the private parties concerned but refused to award damages in respect of the other claims put forward by France, or of the counter-claim put forward by Italy, declaring that the establishment by an arbitral tribunal that one State has failed in its international obligations to another in itself constitutes a serious penalty (pp. 460-461). See para. 155 *supra.*

167. In the *Corfu Channel* case (*Merits*), I.C.J. Reports, 1949, p. 4, the International Court of Justice refused to grant any monetary compensation for the intervention of British ships in Albanian territorial waters and stated that its finding that the act had been in violation of Albanian sovereignty and was therefore wrongful under international law in itself constituted appropriate satisfaction (p. 36). See paras. 5-8 *supra.*

Case concerning the Factory at Chorzow. (Claim for Indemnity) (Merits) (1928)

Germany v. Poland

Permanent Court of International Justice Series A, No. 17

168. Following the determination by the Permanent Court that it had jurisdiction (P.C.I.J., Series A, No. 9), the Court considered the merits of the dispute between Germany and Poland over the factory at Chorzow which had previously been owned and managed by two German companies. Regarding the general issues involved, the Court declared that:

> "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law . . . The reparation due by one State to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual, the violation of which rights causes damage, are always on a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State." (pp. 27-28)

The Court also observed that, ". . . it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." (p. 29)

169. Turning to the assessment of the damage caused by an unlawful act, the Court held that ". . . only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account." (p. 31) More generally, the Court stated that:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (p. 47)

170. The Court found that, in the particular circumstances, restitution was not possible and that damages would have to be assessed in lieu, on a lump sum basis. In calculating the damages, the Court considered that this might include any margin of profit which was found to remain after deducting operational and other costs. The Court held, however, that any damage arising out of the competition of the Chorzow factory with the former German operating company was too indeterminate to be taken into account. As regards the forms and method of payment, the Court determined that, in view of its jurisdiction to determine whether reparation was due *vel non*, ". . . it may well determine to whom the payment shall be made, in what place and at what moment; in a lump sum or maybe by instalments; where payment shall be made; who shall bear the costs, etc." (p. 61; generally on the question of assessment of compensation see pp. 47-61). See also, *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Jurisdiction), Permanent Court of International Justice, Series A, No. 9, at* p. 21.

171. In the *Central Rhodope Forests* case (*Merits*), RIAA, Vol. III, p. 1405, the Arbitrator held that restitution of the property concerned would be impracticable in the circumstances and awarded damages in lieu, based on the value of the contracts at the date of dispossession (pp. 1434-1435). See para. 121 *supra.*

The Expropriated Religious Properties Case (1920)

France, Spain and United Kingdom v. Portugal

Arbitrators: de Savornin Lohman (Netherlands); Lardy (Switzerland); Root (United States of America)

Reports of International Arbitral Awards, Vol. I, p. 7

172. Portugal seized certain church properties alleged to belong to nationals of France, Great Britain and

Spain. The Governments concerned agreed to submit the resulting claims to a tribunal established in accordance with the 1907 Hague Convention for the Pacific Settlement of International Disputes. One claim put forward by the French Government was dismissed since the nationality of the claimant had not been proved and one British claim was abandoned. As regards the other claims of British and French nationals, the Tribunal held that it would be just and equitable for Portugal to retain the properties, subject to payment of monetary compensation, at 6 per cent annual interest, that being the legal interest rate in Portugal. The decision was reached having regard to the fact that Portugal had not seized the properties for pecuniary gain. Of the nineteen Spanish claims, seventeen were held to be inadmissible owing to lack of proof of Spanish nationality.

The Corfu Channel Case (Assessment of the Amount of Compensation) (1949)
United Kingdom v. Albania
International Court of Justice Reports, 1949, p. 222

173. The Court decided in its earlier judgement (*I.C.J. Reports 1949*, p. 4 ; see paras. 5-8 and 167 *supra*) that further proceedings would be necessary in order to determine the amount of reparation due to the British Government in respect of the damage its ships had suffered. Albania disputed the jurisdiction of the Court with regard to the assessment of damages, but its arguments were not accepted by the Court and eventually damages were awarded although Albania failed to appear before the Court.

174. The British claim for reparation fell under three headings. The first claim, for the replacement cost of the ship which had been sunk, assessed at the time of loss, was accepted by the Court (pp. 248-249). The second claim, for the damage done to the second ship, was also regarded as a fair and accurate estimate, on the basis of a review carried out by independent experts appointed by the Court (p. 249). Lastly, the British claim in respect of the pensions and other grants given to naval personnel killed or injured, together with the costs of administration, medical treatment, etc., was accepted by the Court as having been established to its satisfaction (pp. 249-250).

Dix Case (1903)
United States, Venezuela
United States-Venezuela Mixed Claims Commission : Umpire : Barge (Netherlands) ; Bainbridge (United States of America) ; Paul (Venezuela)
Reports of International Arbitral Awards, Vol. IX, p. 119

175. Cattle belonging to Dix, a United States citizen, were taken by members of a revolutionary army in Venezuela. The Commission held that the acts of the successful revolutionaries were to be regarded as those of a *de facto* Government and that Venezuela was accordingly liable to pay compensation (p. 120). Dix sold the remaining cattle at a loss and paid damages owing to his failure to fulfil a contract which he had entered into earlier. It was held that his claim under these two heads must be dismissed on the grounds that "international as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure". (p. 121)

Cf. the *Deutz* case, RIAA, Vol. IV, p. 472, on the question of damages for breach of contract, para. 39 *supra*.

S.S. I'm Alone (1933 and 1935)
Canada, United States
Arbitrators : Duff (Canada) ; Van Devanter (United States of America)
Reports of International Arbitral Awards, Vol. III, p. 1609

176. In view of the fact that the *I'm Alone*, although registered in Canada, was *de facto* owned and controlled by a group of persons almost all of whom were United States citizens, the Arbitrators held that no compensation should be paid for the loss of the ship or its cargo. They stated that the United States should formally acknowledge the illegality of the seizure, apologize to the Canadian Government and, as a material amend for the wrong, pay that Government $25,000. The Arbitrators also recommended that compensation should be paid by the United States for the benefit of the crew, none of whom had been a party to the attempted smuggling (p. 1618). See also para. 13 *supra*.

Janes Case (1925)
Mexico, United States
Mexico-United States General Claims Commission : President : van Vollenhoven (Netherlands) ; Mac-Gregor (Mexico) ; Nielsen (United States of America)
Reports of International Arbitral Awards, Vol. IV, p. 82

177. The Commission distinguished between the individual liability of the culprit who had killed Janes and that of the State which had failed to prosecute the offender. In determining the measure of damages the Commission held that not only should the individual grief of the claimants be taken into account, but also "a reasonable and substantial redress . . . for the mistrust and lack of safety resulting from the Government attitude". (p. 89) See paras. 98-99 *supra*.

In the *Almaguer* case, RIAA, Vol. IV, p. 523, at p. 529, the Commission followed the *Janes* case in holding that regard should be had to the degree of denial of justice in assessing damages.

Landreau Claim (1922)
Peru, United States
Arbitrators : Prevost (Peru) ; Finlay (United Kingdom) ; Smith (United States of America)
Reports of International Arbitral Awards, Vol. I, p. 347

178. The Tribunal held that the Peruvian Government was bound to pay on a *quantum meruit* basis for the

discoveries which Théophile Landreau had communicated to the Government and which the Government had appropriated for its own benefit (p. 364). See paras. 48-49 *supra.*

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, p. 120

Claim No. 18

179. Collas et Michel presented a claim for various retirement pensions which they paid to employees whom they had had to dismiss after the cancellation of their concession. The firm admitted that the pensions had been granted on moral or humanitarian grounds. The Tribunal held that the claim must be dismissed in the absence of any legal obligation.

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, p. 103

Claim No. 19 (and No. 21 in part)

180. In 1915 Collas et Michel were evicted from the offices in Salonika on the ground that one of their employees was suspected of spying. In April 1917 the firm was allowed to return, but before they could do so their stores, which had been placed in temporary premises, were destroyed in a fire. The firm claimed the expenses caused by their enforced removal (Claim No. 21, in part) and the value of the stores (Claim No. 19).

181. The Tribunal found that the enforced removal had been justified, having been based on adequate grounds of grave suspicion of espionage which led to the eventual prosecution of the person concerned. It held that this fact did not, however, prevent Greece from incurring financial responsibility for the expense of the removal. The claim for the value of the lost stores, on the other hand, was dismissed on the ground that there was no causal relationship between the removal and the fire which caused the loss of the stores. "Les dégâts n'étaient ni une conséquence prévisible ou normale de l'évacuation, ni attribuables à un manque de précaution de la part de la Grèce". (p. 103)

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, pp. 109-114.

Claim No. 26

182. Collas et Michel sought compensation for the fact that, during the period 1919-1929, they were able to collect lighthouse dues only according to a tariff expressed in drachmas which were falling in value, while the original tariff had been based on gold values. The Tribunal rejected the arguments put forward by the firm that a "gold tariff" had been incorporated in the original concessions and should therefore be continued in the future. The Tribunal nevertheless held that the Greek Government was bound by the principle of good faith to take the necessary measures to ensure the continuation of the concession, which was for public services, on an equitable basis. The Greek Government was found to have acted in default in not taking the appropriate steps in time. The Tribunal declined to accept the proposal of the Greek Government to allow Collas et Michel to profit by the increases in the tariffs for other public services which had been enacted by Greek legislation in view of the international aspect of the concession.

The Tribunal decided that it was necessary that an expert inquiry should be held to estimate what costs would have fallen on Collas et Michel if the firm had functioned in normal conditions. On a basis of this inquiry it could be possible to determine what increase there ought to be in income, while avoiding the two extreme solutions which had been put forward, both of which the Tribunal found inadmissible (pp. 111-114).

Lighthouses Concession Case (1956)

France, Greece

Permanent Court of Arbitration: President: Verzijl (Netherlands); Mestre (France); Charbouris (Greece)

Protocole des Séances, Ordonnances de Procédure et Sentences avec Annexes du Tribunal d'Arbitrage constitué en vertu du compromis signé à Paris le 15 juillet 1931 entre la France et la Grèce, Bureau international de la Cour Permanente d'Arbitrage, pp. 132-135.

Claim No. 27

183. In 1929 the Greek Government seized the lighthouse administration of Collas et Michel without compensation. The Tribunal held that the grantor State had the right to put an end unilaterally to the concession at any time, subject to one fundamental and strict condition, namely, the payment, or guarantee of payment, of a sum equitably determined. In view of its failure to observe this condition the Greek Government, regarded as successor by subrogation to the concession,

had committed an act which was contrary to one of the essential provisions of the contract. The firm was therefore entitled to compensation which ought, so far as possible, to be equal to the benefit of which they were deprived by reason of the curtailment of the concession twenty-five years before its due expiry date. In assessing that compensation, regard was to be had solely to data available at the date of termination, by calculating the net annual profits which Collas et Michel would have earned had they operated the concession for the remainder of its term. The annual figure, calculated according to past figures, was to be converted into United States dollars at the average rate for the years taken in making the calculation, and then converted into French francs at the dollar rate on the date on which the definitive award determining the compensation was given. The Tribunal ordered that an inquiry should be held regarding the details of the calculation. (pp. 132-134).

Opinion in the Lusitania Case (1923)

Germany, United States

Germany-United States Mixed Claims Commission: Umpire: Parker (United States of America); Kiesselbach (Germany); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. VII, p. 32

184. Under the Treaty of Berlin Germany accepted an obligation to pay compensation to the United States in respect of the loss of life caused by the sinking of the *Lusitania* in 1915. The Commission was therefore concerned with calculating the measure of damages. It was decided that, in cases of death, the basis of damages should not be the suffering of the deceased or the loss to his estate, but the loss sustained by his dependants. In calculating the compensation to be paid, regard was to be had not only to the loss of financial support of the deceased's personal services, but also to the mental suffering caused to the claimant as a result of the violent nature of death (pp. 35-37). The Commission held that the amount of compensation to be paid should not be reduced to take account of payments made to claimants under insurance policies on the life of the deceased (pp. 37-38). A United States contention that exemplary or punitive damages should be awarded, was rejected. The Commission distinguished between damages, aimed at providing reparation for a loss or compensation for a wrong, and a penalty, designed to act as a deterrent to punish the wrongdoer. Although municipal courts had on occasions awarded punitive damages, no international arbitral tribunal had ever done so against a sovereign nation in favour of another. Moreover, in the terms of the Treaty of Berlin, which determined the conditions under which the Commission was to operate, no direct reference was made to the award of a penalty, nor was any claim put forward in respect of the losses which the United States Government itself, as opposed to its nationals, had incurred as a result of the war. The Commission therefore concluded that it was "without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none". (p. 44; see pp. 38-44).

See *Administrative Decision No. VI*, RIAA, Vol. VII, p. 155, where the Commission upheld the claim of United States citizens to receive compensation in respect of the loss sustained as the result of the death of a British subject who had been a passenger on the *Lusitania*.

The Mavrommatis Jerusalem Concessions (1925)

Greece v. United Kingdom

Permanent Court of International Justice, Series A, No. 5

185. The Permanent Court of International Justice held that, although another concessionary had been granted the right to demand the annulment of certain concessions held by Mr. Mavrommatis, in breach of the international obligations accepted by Great Britain as the Mandatory for Palestine, nevertheless, since no loss to Mr. Mavrommatis resulting from this circumstance had been proved, the Greek Government's claim for an indemnity should be dismissed.

186. See also the *Martini* case, RIAA, Vol. II, p. 975, where the Tribunal determined that no pecuniary reparation should be made for the cancellation of a concessionary contract in the absence of proof of any loss; certain payments which the claimants had been ordered to make were annulled however (pp. 1000-1002). See also paras. 64-65 *supra*.

187. In the *Lighthouses Concession* case, *Claim No. 5*, the Tribunal awarded to the claimants the token sum of one franc in view of the fact that they were unable to establish the amount of their loss. See para. 18 *supra*.

Miliani Case (1903)

Italy, Venezuela

Italy-Venezuela Mixed Claims Commission: Umpire: Ralston (United States of America); Agnoli (Italy); Zuloaga (Venezuela).

Reports of International Arbitral Awards, Vol. X, p. 584

188. In the course of this case involving the double nationality of the claimant the Umpire declared that, irrespective of the attitude which might be adopted in diplomatic negotiations, international commissions could normally only award damages to a national of the claimant country. If the injured person changed his nationality, the former State was rarely able to present a claim or to recover damages, however much its own dignity might have been affected by the treatment of its subject, unless its own pecuniary rights were involved (p. 591).

Provident Mutual Life Insurance Company and Others: Life-Insurance Claims (1924)

Germany, United States

Germany-United States Mixed Claims Commission: Umpire: Parker (United States of America); Kiesselbach (Germany); Anderson (United States of America)

Reports of International Arbitral Awards, Vol. VII, p. 91.

189. The United States presented a group of claims on behalf of American insurance companies who had made payments under polices insuring the lives of passengers lost on the *Lusitania*. It was claimed that the sinking of the ship had forced premature payment to be made and had caused a loss to the insurers equal to the difference between the value of the policies and the reserve which had been accumulated on the basis of actuarial tables excluding war risks.

190. The Commission rejected this contention, holding that the insurance companies should have regard to every possible risk when offering the policies (pp. 106-107). Moreover under the terms of the Treaty of Berlin Germany was under no obligation to compensate for losses of this kind.

> "Although the act of Germany was the immediate cause of maturing the contracts . . . *this effect* so produced was a circumstance incidental to, but not flowing from such act as the normal consequence thereof, and was, therefore, in legal contemplation remote — not in time — but in natural and normal sequence." (Umpire Parker at p. 113; italics in original)

Reference was also made to the fact that no international arbitral award had been given upholding the claim of an insurer to recover in respect of the loss suffered as a result of the death of the insured person (pp. 114-116).

191. It may be noted that in *Administrative Decision No. II*, RIAA, Vol. VI, p. 212, given by the Tripartite Claims Commission set up by Austria, Hungary and the United States, Mr. Parker, the sole Commissioner, held that although Austria and Hungary remained primarily liable for their respective public debts, they were not liable for the debts of their nationals to United States nationals in the absence of any act on the part of the Government concerned operating upon such debts to the prejudice of United States creditors.

> "The suggestion that, in the absence of such act by the Austrian (Hungarian) Government, it is obligated to pay American creditors for losses sustained by them due to depreciation during and after the war in the exchange value of Austro-Hungarian currency can be sustained only on the theory that Austria (Hungary) is liable for all of the direct and indirect, immediate and ultimate consequences of the war." (pp. 222-223)

Such a view, declared the Commissioner, was clearly unjustified.

Reparation for Injuries Suffered in the Service of the United Nations (1949)

International Court of Justice Reports, 1949, p. 174

192. The Advisory Opinion given by the International Court in this case was chiefly concerned with determining whether or not the United Nations had capacity to bring an international claim against a State in the event that an agent of the United Nations suffered injury in circumstances involving the responsibility of the State concerned. However, in formulating its opinion the Court gave several rulings applicable in the case of any international claim. Thus, as regards the question of damages, the Court declared that the measure of the reparation which the United Nations would be entitled to recover should depend upon the amount of damage which the Organization has suffered as a result of the wrongful act and should be calculated in accordance with the rules of international law. This might include, for example, reimbursement of any reasonable compensation which the United Nations had had to pay, or expenses incurred in replacing the agent who had died or been disabled. (p. 181)

193. The Court also declared that the rule of nationality of claims provided no obstacle to the presentation of a claim by the United Nations. That rule rested upon the principle that, in bringing a claim, a State was acting to secure respect for obligations due towards itself, a principle equally applicable in the case of the United Nations. In the event that a claim was brought by the national State and by the United Nations, there could be no question of requiring the defendant State to pay reparation twice over. (pp. 185-186)

Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the War (1930)

Germany, Portugal

Arbitrators: de Meuron; Fazy; Guex (Switzerland)

Reports of International Arbitral Awards, Vol. II, p. 1035

194. In dealing with the question of damages in respect of various requisitions and acts of pillage of Portuguese property in Belgium during the period of German military occupation, the Tribunal distinguished between acts, such as requisitions, which were authorized within certain limits and those absolutely prohibited such as pillage. In the first case the damages awarded could not exceed the amount which should have been paid earlier so as to exclude international responsibility, whilst in the case of pillage the indemnity should at least be equal to the value of the goods which disappeared in the course of pillage. (p. 1040) See paras. 19 and 58 *supra.*

195. As regards the acts of German forces in the Portuguese Colonies the Tribunal refused to award penal damages as compensation for the violation of Portuguese sovereignty and offences against international law committed by Germany. The Tribunal considered that penal damages would constitute a deterrent punishment and that it lacked power to inflict punishment, as opposed to determining the amount of damages due by way of indemnity. (pp. 1074-1077). See paras. 17 and 20-21 *supra.*

Russian Indemnity Case (1912)

Russia, Turkey

Permanent Court of Arbitration: Lardy (Switzerland); de Taube and Mandelstam (Russia); Abro and Réchid (Turkey).

Reports of International Arbitral Awards, Vol. XI, p. 421.

196. Under the Treaty of Constantinople Turkey agreed to indemnify Russian subjects for damage sustained during the war of 1877-1878 between the two countries. The payments to be made by Turkey having been delayed, Russia presented a claim for interest on the deferred payments. In considering the question of damages the Court stated as follows :

> *"Le tribunal est d'avis que tous les dommages-intérêts sont toujours la réparation, la compensation d'une faute. A ce point de vue, tous les dommages-intérêts sont compensatoires, peu importe le nom qu'on leur donne . . . Il est certain en effet que toutes les fautes, quelle qu'en soit l'origine, finissent par être évaluées en argent et transformées en obligation de payer ; elles aboutissent toutes, ou peuvent aboutir, en dernière analyse, à une dette d'argent. — Il n'est donc pas possible au tribunal d'apercevoir des différences essentielles entre les diverses responsabilités. Identiques dans leur origine, la faute, elles sont les mêmes dans leurs conséquences, la réparation en argent."* (p. 440)

Accordingly, the Court held that Turkey was, in principle, responsible for the payment of interest. The Court dismissed a Turkish contention that *force majeure*, in the form of financial difficulties, had prevented prompt payment, on the ground that the sums in question could not be said to have imperilled the existence of the Ottoman Empire or seriously to have compromised its internal or external situation. (p. 443) The Court found, however, on the facts that Russia had renounced her claim for interest in referring, in correspondence with the Turkish Government, to the balance of the principal as the balance of the indemnity, without reserving her right to interest on the principal, and was subsequently estopped from reopening the question. (pp. 445-446) See para. 148 *supra*.

Spanish Zone of Morocco Claims (1925)
Spain, United Kingdom
Rapporteur : Huber (Switzerland)
Reports of International Arbitral Awards, Vol. II, p. 615

197. Before considering the individual claims the Rapporteur dealt with the question of interest. (pp. 650-651) The British Government sought compound interest at 7 per cent whilst the Spanish Government was only prepared to give simple interest at 5 per cent. The Rapporteur determined that 7 per cent should be the rate of interest, this being within the normal rate of interest in Morocco at the time of the occurrences. Compound interest was not awarded however, on the ground that this had been refused by all previous international tribunals.

In the *French Claims Against Peru*, RIAA, Vol. I, p. 215, the Tribunal refused to award compound interest on the ground that this required the express consent of the debtor which had not been given. See para. 31 *supra*.

Torrey Case (1903)
United States, Venezuela
United States - Venezuela Mixed Claims Commission : Umpire : Barge (Netherlands) ; Bainbridge (United States of America) ; Paul (Venezuela)
Reports of International Arbitral Awards, Vol. IX, p. 225

198. Torrey was arrested by mistake by the Venezuelan authorities. He was promptly released and an apology given. It was held that damages should be awarded for the personal inconvenience suffered but that punitive damages should be refused.

The Trail Smelter Case (1938 and 1941)
Canada, United States
Arbitrators : Hostie (Belgium) ; Greenshields (Canada) ; Warren (United States of America)
Reports of International Arbitral Awards, Vol. III, p. 1905

199. In accordance with the terms of its Convention the Tribunal followed precedents in United States cases in determining points at issue, in particular as regards the measure of damages. (pp. 1924-1933 ; p. 1950). The Tribunal rejected a claim for loss of business caused to commercial enterprises on the ground that such loss caused by a nuisance, even if proved, was too indirect and remote to become the basis of an indemnity. (p. 1931) The Tribunal refused to award a sum in respect of the wrong done to the United States in violation of its sovereignty, as sought by the United States, on the ground that any sum so awarded would fall outside the ambit of the damages envisaged under the Convention ; the Tribunal distinguished the case of the *I'm Alone* (paras. 13 and 176 *supra*), where such damages were awarded. (pp. 1932-1933 ; pp. 1954-1955) The Tribunal also refused to award damages in respect of monies spent in ascertaining the existence and extent of the damageable consequences of an injury, as opposed to sums spent in mending such consequences. (pp. 1959-1962)

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